

**APPENDIX**

FILE

JUL 19

MICHAEL RODAK,

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1973

**No. 72-1371**

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DONALD C. ALEXANDER,  
Commissioner of Internal Revenue, PETITIONER

—V.—

**"AMERICANS UNITED" INC., ETC., ET AL.**

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

PETITION FOR CERTIORARI FILED APRIL 10, 1973  
CERTIORARI GRANTED JUNE 4, 1973

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1973

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DONALD C. ALEXANDER,  
Commissioner of Internal Revenue, PETITIONER

—v.—

“AMERICANS UNITED” INC., ETC., ET AL.

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## CIVIL DOCKET

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Number 2260-70

"AMERICANS UNITED" incorporated as PROTESTANTS AND  
OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH  
AND STATE, GLENN L. ARCHER *and* C. STANLEY  
LOWELL, suing on behalf of themselves and others  
similarly situated

*vs.*

RANDOLPH W. THROWER, as Commissioner of Internal  
Revenue

## Attorneys

Franklin C. Salisbury  
919 18th St. N.W.  
Room 800

Richard A. Scully  
Dept. of Justice

Date	Account	Rec'd	Disb'd	Date	Account	Rec'd
1970						
July 30	Salisbury	10.00				
1971						
Mar. 17	Salisbury	5.00				

## DATE

## PROCEEDINGS

1970	Deposit for cost by
Jul 30	Complaint, appearance; Affidavit; Exhibit filed

DATE	PROCEEDINGS
1970	
Jul 30	Summons, copies (3 and copies (3) of Complaint issued D.A. ser 7-31; deft. & A.G. ser 8-3-70
Oct 19	Affidavit of James L. Adams to the complaint; exhibit A; c/m 10-14. filed
Oct 23	Stipulation extending time for deft. to answer or otherwise plead to and including 12-1-70 filed
Oct 28	Stipulation filed 10-23-70, approved (N) (Fiat) Pratt, J.
Dec 2	Motion of deft. to dismiss the complaint; P&A; c/m 12-1; M.C.; appearance of Richard A. Scully. filed
Dec 11	Stipulation for extension of time to and including 1-15-71 for pltf's. to respond to motion to dismiss. filed
Dec 14	Stipulation extending time of pltf. to file response to deft's motion to dismiss to 1-15-71 approved. (Fiat) Pratt, J.
Jan 7	Stipulation to extend time for pltf. to respond to motion to dismiss to and including February 15, 1971. filed
Jan 11	Stipulation extending time to respond to motion to dismiss to 2-15-71, granted. (fiat) (N) Pratt, J.
Feb 12	Motion of plfts. for leave to file amended complaint; P&A; exhibits; c/m 2-11-71; M.C. filed
Feb 16	Memorandum of pltf. in opposition to motion to dismiss; c/m 2-12. filed
Mar 3	Motion of pltf. to amend complaint granted
Mar 3	Amended complaint. filed

DATE	PROCEEDINGS
Mar 3	Motion of deft. to dismiss complaint, argued and taken under advisement. (Rep: Phyllis Harper) Pratt, J.
Mar 9	Order denying pltf's motion to convene Three-Judge Court and granting deft's motion to dismiss complaint. (N) Pratt, J.
Mar 17	Notice of appeal by pltf. from order of 3-9; copy mailed to Richard A. Scully, Esq.; \$5.00 deposit by Salisbury. filed

[Attachment to original complaint filed July 30, 1970]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No.

"AMERICANS UNITED" incorporated as PROTESTANTS AND  
OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH  
AND STATE, GLENN L. ARCHER and C. STANLEY  
LOWELL, suing on behalf of themselves and others  
similarly situated, PLAINTIFFS

—against—

RANDOLPH W. THROWER as Commissioner of Internal  
Revenue, DEFENDANT

COMPLAINT

AFFIDAVIT

STATE OF MARYLAND                    )  
  ) SS  
COUNTY OF MONTGOMERY            )

The above-captioned case was filed on July 30th, 1970 in this Court according to belief of your affiants. Your affiants have read newspaper reports, which they verily believe to be true, that the defendant has been using the authority granted in Sections 170 (c) and 501 (c) (3) of the Internal Revenue Code of 1954 as a weapon to prevent groups of persons of like mind from publicly expressing their opinions on matters of political and social interest, including the use of the modern media and the press, so as to influence legislation to redress grievances which arise in contemporary society. The threat and effect of defendant's actions is that your affiants and other persons may not make gifts out of pre-tax income to organizations which advocate causes in such a manner legislation may be influenced.

Your affiants have in the past been able to petition the Government for redress of grievances using as a vehicle "Protestants and Other Americans United for Separation of Church and State" a nonprofit charitable corporation using pre-tax dollars as permitted by Section 170 (c) of the Internal Revenue Code of 1954 until the 501 (c) (3) status of the vehicle corporation was revoked by action of the defendant. Your affiants have read the letter from the District Director of Internal Revenue Service, who is under the direction and control of defendant, addressed to Protestants and Other Americans United for Separation of Church and State, dated April 25, 1969, a copy of which is made a part of this Affidavit. This letter resulted in the loss of 501 (c) (3) status to Americans United and deprivation of affiants' privilege of support of the cause of religious freedom through tax-exempt gifts to Americans United. The letter proves that the Commissioner of Internal Revenue ruled that a substantial part of the activities of Americans United was "carrying on propaganda or otherwise attempting to influence legislation." Your affiants believe that there are organizations which do not believe in the principle of separation of church and state as found in the First Amendment to the United States Constitution and that such organizations are active in petitioning the Government for a redress of their grievance which arise from the application of the constitutional principle of separation of church and state to current church-state problems. These organizations continue to enjoy 501 (c) (3) status and their donors 170 (c) treatment.

Your affiants have thus been deprived of the full use of their money and resources to petition the Government through the vehicle of Americans United for Separation of Church and State, while others of opposing views are not so inhibited by defendant, Randolph W. Thrower.

Your affiants know, from personal knowledge, that many large donors who have in the past used Americans United as a vehicle to express their opinions on church-state relations in the United States and to petition the Government for a redress of their grievances in this field of religious liberty have been restrained from so doing by

the change in status of Americans United. Your affiants have read newspaper reports which they believe to be true that other organizations which express opinions and advocate causes and petition the Government for redress of grievances have similarly been denied their 501 (c) (3) status and their donors denied the 170 (c) advantages arbitrarily and capriciously by the defendant, including organizations which have opinions on conservation of natural resources.

Your affiant believes and claims that defendant's use of 170 (c) and 501 (c) (3) as a device to hamper the free expression of opinion, the advocacy of causes, and the right to petition the Government for redress of grievances, is contrary to the Constitution of the United States as your affiants understand the same and have caused and will do them and others irreparable harm.

/s/ Dr. C. Stanley Lowell

/s/ Dr. Glenn L. Archer  
Affiants

SUBSCRIBED AND SWORN BEFORE ME THIS  
30th day of July, 1970, by the above named affiants  
personally.

/s/ Notary Public

My Commission Expires 7/1/74.

## US Treasury Department

District Director  
Internal Revenue Service

Date: APR 25 1968

REGISTERED MAIL Protestants and Other Americans  
United for Separation of Church  
and State  
1633 Massachusetts Avenue, N.W.  
Washington, D.C. 20036

Gentlemen:

We have reconsidered the ruling dated July 3, 1950 in which you were held exempt from Federal income tax as an organization described in section 101(6) of the Internal Revenue Code of 1939 (corresponding to section 501 (c) (3) of the Internal Revenue Code of 1954).

The available information indicates that you were incorporated in 1948 under the laws of the District of Columbia. The purpose of your organization as stated in its articles of incorporation is to "... defend and maintain religious liberty in the United States by the dissemination of knowledge concerning the constitutional principle of separation of church and state. . . ."

In brief, your activities consist of the production, publication, sale and other distribution of your monthly review *Church and State*, films, records, taped speeches, books, booklets, pamphlets, and news releases; operation of a speakers bureau; operation of a legal department; organization of local chapters and study groups; and periodic appearances before legislative bodies and political conventions.

While part of your activities may be classified as "educational" or "charitable" within the meaning of section 501(c)(3) of the Code, you are, nonetheless, an active advocate of a political doctrine. In various publications you have stated your objectives to include: the mobiliza-



tion of public opinion; resisting every attempt by law or the administration of law which widens the breach in the wall of separation of church and state; working for the repeal of any existing state law which sanctions the granting of public aid to church schools; and uniting all "patriotic" citizens in a concerted effort to prevent the passage of any federal law allotting, directly or indirectly, federal education funds to church schools.

The majority of your activities are in furtherance of the objectives stated above. Although a portion of the materials disseminated by you is of a reporting nature, detailing alleged violations of basic church-state separationist principles, the entirety of your publications is inundated with both: (1) examples and details of POAU activities which were legislation oriented; and (2) implied and express calls to action in an attempt to unite and mobilize public opinion against impending encroachments on your separationist doctrine, the preservation of which is your reason for being.

Section 501(c) (3) of the Internal Revenue Code of 1954 provides for the exemption of the following organizations:

"Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Subsection 1.501(c) (3)-1(a) (1) of the Income Tax Regulations provides in part:

"In order to be exempt as an organization described in section 501(c) (3) an organization must be both

organized and operated exclusively for one or more of the purposes specified in such section. . . .”

Subsection 1. 501(c) (3)-1(c) (3) (i) of the Income Tax Regulations provides in part:

“An organization is not operated exclusively for one or more exempt purposes if it is an ‘action’ organization. . . .”

Subsection 1.501(c) (3)-1(c) (3) (iv) of the Income Tax Regulations provides in part:

“An organization is an ‘action’ organization if it has the following two characteristics:

(a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates, or campaigns for, the attainment of such main or primary objectives or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public. In determining whether an organization has such characteristics, all the surrounding facts and circumstances, including the articles and all activities of the organization, are to be considered.”

The requirement that an organization exempt from income tax under Section 501(c) (3) of the Internal Revenue Code of 1954 be operated exclusively for one or more of the purposes set forth in that section is equally fundamental to qualification under Section 170(c) of the Internal Revenue Code.

In view of your objectives and the substantiality of the legislative activities undertaken in pursuit of these objectives, we have concluded that you are an “action” organization as defined in subsection 1.501(c) (3)-1(c) (3) (iv) of the Regulations. By advocating your position to others, thereby attempting to secure general acceptance of your beliefs; by engaging in general legislative activities to implement your views; and by urging the enactment or defeat of proposed legislation which you believe

inimical to your principles, you have ceased to function exclusively in the educator's role of informant in that your advocacy is not merely to increase the knowledge of your audience, but to secure acceptance of, and action on, your views concerning legislative proposals, thereby, encroaching upon the proscribed legislative area.

Based upon the foregoing, it is our conclusion that your organization is not exempt from Federal income taxes under section 501(c)(3) of the Internal Revenue Code of 1954 and does not qualify to receive contributions deductible under section 170 of the Code. Consequently, our ruling dated July 3, 1950, is revoked.

Inasmuch as the periods of limitation for the assessment of deficiencies in Federal income tax for your taxable years ending December 31, 1961, December 31, 1962, December 31, 1963, December 31, 1964, and December 31, 1965 do not expire before April 15, 1970, you are required to file Federal income tax returns, forms 1120, for those years and for all subsequent years.

Very truly yours,

/s/ Irving Machiz  
IRVING MACHIZ  
District Director

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2269-70

[Filed March 3, 1971]

"AMERICANS UNITED" incorporated as PROTESTANTS AND  
OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH  
AND STATE, GLENN L. ARCHER and C. STANLEY  
LOWELL, suing on behalf of themselves and others  
similarly situated, PLAINTIFFS

—against—

RANDOLPH W. THROWER as Commissioner of Internal  
Revenue, DEFENDANT

AMENDED COMPLAINT

To the Honorable, the Judges of Said Court:

Plaintiffs, by Franklin C. Salisbury, Esq., their attorney, complaining of the defendants, allege:

1. This action is brought under Title 28, Section 1331 of the United States Code Annotated, whereby jurisdiction is bestowed on this Court in a civil action wherein the matter in controversy exceeds the sum or value of \$10,000 and arises under the Constitution and laws of the United States; and by section 1340 of said Title 28, whereby jurisdiction is bestowed on this Court in any civil action arising under an Act of Congress providing for internal revenue. This action is also brought under Section 10 of the Administrative Procedures Act, 5 U.S.C. §§ 701-706.

2. (a) Plaintiffs Glenn L. Archer and C. Stanley Lowell are residents of the State of Maryland. Each is a citizen of the United States and of the State in which he resides.

(b) Plaintiff, Protestants and Other Americans United for Separation of Church and State, known as "Ameri-

cans United", is a nonprofit, educational corporation organized under the laws of the District of Columbia, with its principal offices in the State of Maryland where it is qualified as a foreign nonprofit corporation.

(c) Plaintiffs Glenn L. Archer and C Stanley Lowell are federal income taxpayers who have regularly filed income tax returns and paid federal income taxes and intend to do so for the year 1970 and future years, pursuant to the "Federal Internal Revenue Code of 1954", as amended.

3. (a) Defendant Randolph W. Thrower is the Commissioner of Internal Revenue and is by law charged with the administration and enforcement of said Federal income tax laws, including the interpretation and enforcement of said laws and the regulations relating thereto.

4. (a) This action is brought in behalf of the individual plaintiffs and all other Federal income taxpayers similarly situated. This class is so numerous that joinder of all members thereof is impractical. Questions of law and fact are involved herein which are common to all members of this class. Prosecution of separate actions by members of this class would create a risk of inconsistent or varying adjudications with respect to the members thereof.

(b) This action is brought by Americans United on its own behalf and on behalf of all of its members, whose religious and political freedom guaranteed under the First Amendment to the United States Constitution has been and is being denied by defendant's revocation of the Internal Revenue Service holding of July 3, 1950 that plaintiff was exempt from Federal Income Tax as an organization described in Section 101 (6) of the Internal Revenue Code of 1939 (corresponding to Section 501 (c) (3) of the Internal Revenue Code of 1954) for the stated reason that the organization is "an active advocate of a political doctrine"—namely, an advocate of the religious clauses of the First Amendment to the Constitution of the United States.

(c) This action is brought by the individual plaintiffs because their right to "freedom of speech" and "of the

press", and "to petition the Government for a redress of grievances, as guaranteed by the First Amendment to the United States Constitution, has been and is being abridged by the action of defendant under Sections 170 and 501 (c) (3) of the Internal revenue Code of 1954. (28 U.S.C. 170 (a) through (c) and 28 U.S.C. 501 (a) through (c).)

(d) This action is brought on the further ground that defendant in administering the acts in question deprives the plaintiffs of the due process of law, guaranteed by the Fifth Amendment to the United States Constitution, in that the deprivation of the privilege of using pre-tax dollars to exercise first amendment rights is denied to donors of corporate plaintiff i.e. to one exempt organization a substantial portion of whose activities is the carrying on of "propaganda, or otherwise attempting to influence legislation" but is not denied to donors of other similar organizations where the "portion" is the same, but the size of the organization greater.

(e) This action is also brought by the corporate plaintiff on behalf of itself and all other similarly situated nonprofit corporations, which have lost or are being threatened by a loss of their status as 501 (c) (3) organizations by action of the defendant Thrower, or predecessor, under said Federal income tax laws, while other organizations similarly situated continue to enjoy their 501 (c) (3) status and advantages.

5. The amount in controversy herein is in excess of \$10,000.

6. The Federal Internal Revenue Code, Title 26, U.S. C.A. Sections 170 and 501, and the actions of defendant Thrower in giving force and effect thereto, are unconstitutional and void insofar as they deny to plaintiff Americans United and other nonprofit organizations the enjoyment of the tax status granted by said Section 501 (c) (3) because of their exercise of First Amendment rights of their members and as they deny to the individual plaintiffs the privilege of taking as an allowable deduction against income taxes a charitable contribution to Americans United or other similar nonprofit organizations used as a vehicle to exercise the rights of freedom of speech,

press, and to petition the Government for redress of grievances. The First and Fifth Amendments to the United States Constitution prohibit such an Act of Congress.

7. Moreover said statutes or acts—said portions of the Internal Revenue Code of 1954 and actions of the defendant Thrower in implementation thereof, deprive the plaintiffs and other nonprofit organizations and donors thereto of the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. Plaintiffs who believe in the worth of the religious clauses of the First Amendment are, in effect, penalized by the tax laws, as administered by defendant, because they express an opinion and advocate strict compliance with the Constitution of the United States while those who oppose, since their organizations are giants in size compared to plaintiff Americans United, may make tax deductible donations for their cause, because, among other reasons, what is "substantial" in the case of Americans United is not "substantial" in the case of others. The change of status because of the substantiality of the activities of one organization as opposed to another in expressing opinions and advocacy and influencing legislation is an unreasonable classification against plaintiff Americans United and by reason thereof, this plaintiff, and other organizations similarly situated, are being discriminated against and denied equal protection of the laws in violation of the Fifth Amendment of the United States Constitution.

The individual plaintiffs, by reason of the Congress having made the law (26 U.S.C. 170 and 501 (c) (3)) and defendant's carrying out the said law in full force and effect suffer an abridgement of their freedom of speech, of press, and their right to petition the Government for a redress of grievances, i.e., inter alia, their attempts to influence legislation which concerns their grievances. This constitutes a violation of the First Amendment.

Further the corporate plaintiff on behalf of its members and the individual plaintiffs claim that their tax dollars are being used by reason of the said sections of the Internal Revenue Code so as to aid and strengthen churches whose size permits their influencing of legis-

lation to be relatively less substantial than that of the corporate plaintiff with the result that the effect of defendant's action in giving full force and effect to the said sections of the Internal Revenue Code is to aid one religion as opposed to another, prefer one religion over another and to support certain religious activities as opposed to others so as to cause an establishment of religion and a prohibition of the free exercise of religion contrary to the strictures of the religious clauses of the First Amendment to the United States Constitution.

### OTHER ALLEGATIONS

This suit involves a genuine case or controversy between the plaintiffs and the defendants.

The exemption clause of 501 (c) (3) amounts to an invalid unconstitutional delegation of legislative power in that the statutory standards of "substantiality" and "propaganda" are lacking in specificity for the carrying out of the purpose of Section 501 (c) (3). The uncertainty of the definition of "substantiality" and "propaganda" are so apparent as to be devoid of meaning and inadequate as a standard for administrative action.

The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless an injunction be granted. As a result of defendant's action the corporate plaintiff has operated at a loss for the year 1970, for the first time since 1949, by reason of the defendant's action in revoking its 501 (c) (3) status, which, if continued, will inevitably force the corporate plaintiff to cease its activities as an association for the purpose of assisting persons who seek legal redress for infringement of their constitutionally guaranteed, and other rights, by access to the courts and to the legislatures. The loss exceeded ten thousand dollars.

The plaintiffs do not seek to enjoin or restrain the assessment or collection of federal taxes.

No assessment for federal taxes has been made against the plaintiffs as a result of the revocation of Section 501 (c) (3) status of Americans United nor do the plaintiffs seek a refund of federal taxes.



The defendant acted in an arbitrary and capricious manner and has abused his discretion in applying the substantial "influencing" clause of the statutory exemption, which is a part of 501 (c) (3), or in the alternative, if the defendant has correctly applied the exemption language, then the exemption clauses themselves are null and void as being contrary to the First and Fifth Amendments to the United States Constitution, as well as constituting an invalid delegation of legislative power.

WHEREFORE, plaintiffs pray that a three-judge constitutional court be convened pursuant to Title 28, U.S. C.A., Sections 2281 and 2284 and that on behalf of themselves and others similarly situated, the following relief be granted:

1. A declaratory judgment that the exemption clauses of Section 501 (c) (3) are separable from the remainder of the section and are null and void as being unconstitutional under the First and Fifth Amendments to the United States Constitution and unconstitutional as an invalid delegation of legislative power to an administration official.

2. Judgment requiring defendant Thrower to reevaluate corporate plaintiff as a Section 501 (c) (3) charitable corporation and to reinstate corporate plaintiff on the "Cumulative List of Organizations Described in Sec. 170 (c) of the Internal Revenue Code of 1954" published by the Government Printing Office if found to be eligible under Sec. 501 (c) (3).

3. Judgment enjoining defendant Thrower from enforcing Sections 170 (c) and 501 (c) (3) of Title 26 U.S. C.A., so as to deprive the individual plaintiffs and others similarly situated of the benefit of tax advantages in the exercise of their First Amendment rights by reason of the unconstitutionality of those sections.

4. Judgment, in the alternative, requiring defendant Thrower to reopen its revocation proceedings against the corporate plaintiff in the light of the final decision in this case and reevaluate the corporate plaintiff's status as a Section 501 (c) (3) charitable corporation.

5. Judgment that the action of the defendant in changing the status of the corporate plaintiff was arbitrary and capricious.

6. Judgment assessing the costs and expenses of this action against the defendants.

7. Such other and further relief as the nature of the case requires.

/s/ Franklin C. Salisbury  
FRANKLIN C. SALISBURY  
Attorney for Plaintiffs  
919 - 18th St., N.W.,  
(Rm. 800)  
Washington, D. C.  
Tel: 301-588-2120

*Of Counsel*

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Washington, D .C.  
Tel: 703-527-7749

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2269-70

[Filed March 3, 1971]

"AMERICANS UNITED" incorporated as PROTESTANTS AND  
OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH  
AND STATE, GLENN L. ARCHER *and* C. STANLEY  
LOWELL, suing on behalf of themselves and others  
similarly situated, PLAINTIFFS

v.

RANDOLPH W. THROWER as Commissioner of Internal  
Revenue, DEFENDANT

MOTION TO DISMISS

Comes now the defendant, Randolph W. Thrower, Commissioner of Internal Revenue, by his attorneys, and pursuant to Rule 12(b), Federal Rules of Civil Procedure, moves this Court for an order dismissing the plaintiffs' complaint on the following grounds:

1. The Court lacks jurisdiction over the subject matter of this action.
2. The complaint fails to state a claim upon which relief can be granted.
3. The complaint seeks a declaratory judgment with respect to federal taxes which is prohibited by Section 2201, Title 28, United States Code.

4. The complaint seeks injunctive relief which is barred by Section 7421 of the Internal Revenue Code of 1954.

/s/ Thomas A. Flannery  
THOMAS A. FLANNERY  
United States Attorney  
RICHARD A. SCULLY  
Trial Attorney

/s/ John J. McCarthy  
JOHN J. MCCARTHY  
Chief  
General Litigation Section

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2269-70

"AMERICANS UNITED" incorporated as PROTESTANTS AND  
OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH  
AND STATE, GLENN L. ARCHER *and* C. STANLEY  
LOWELL, suing on behalf of themselves and others  
similarly situated, PLAINTIFFS

v.

RANDOLPH W. THROWER as Commissioner of Internal  
Revenue, DEFENDANT

ORDER

Upon the foregoing Motion of the Plaintiffs, leave to  
to amend by filing an Amended Complaint is HEREBY  
GRANTED this 3rd day of March, 1971 by the United  
States District Court for the District of Columbia.

/s/ John H. Pratt  
United States District Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA CIRCUIT

No. 2269-70

[Filed March 9, 1971]

"AMERICANS UNITED" incorporated as Protestants and  
Other Americans United for Separation of Church  
and State: Glenn L. Archer and C. Stanley Lowell,  
suing on behalf of themselves and others similarly  
situated, PLAINTIFFS

v.

RANDOLPH W. THROWER as Commissioner of Internal  
Revenue, DEFENDANT

## ORDER

Upon consideration of the plaintiffs' petition to convene a three-judge constitutional court pursuant to the provisions of 28 U.S.C. § 2282, and the defendant's motion to dismiss the above-entitled action, and upon argument of counsel for the plaintiffs and the defendant; it appearing to the Court that the plaintiffs' amended complaint does not raise a substantial constitutional question, it is this 9th day of March, 1971,

Ordered and Adjudged that the plaintiffs' petition to convene a three-judge court in this action be and the same is hereby denied.

It also appears to the Court that the provisions of 26 U.S.C. § 7421 (a) prohibit the injunctive relief sought in the plaintiffs' amended complaint; that the provisions of 28 U.S.C. § 2201 prohibit the declaratory relief sought therein; and that the Court lacks jurisdiction to grant the relief requested. *National Council on the Facts of Overpopulation v. Caplin*, 224 F. Supp. 313 (D. D.C., 1963). Accordingly, it is further

Ordered and adjudged that the defendant's motion to dismiss be granted and the plaintiffs' complaint is hereby dismissed.

/s/ John H. Pratt  
United States District Judge

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 71-1299

"AMERICANS UNITED" INC., ET AL, APPELLANTS

v.

JOHNNIE M. WALTERS, COMMISSIONER OF INTERNAL  
REVENUE

---

Appeal from the United States District Court  
for the District of Columbia

---

Decided January 11, 1973

*Mr. Alan Morrison*, with whom *Mr. Franklin C. Salisbury* was on the brief, for appellants.

*Mr. Leonard J. Henzke, Jr.*, Attorney, Tax Division, Department of Justice, with whom *Messrs. Thomas A. Flannery*, United States Attorney at the time the brief was filed, and *Grant W. Wiprud*, Attorney, Tax Division, Department of Justice, were on the brief, for appellee.

Before: FAHY, *Senior Circuit Judge*, TAMM and WILKEY, *Circuit Judges*.

Opinion by *Circuit Judge TAMM*.

Concurring Opinion by *Circuit Judge WILKEY*, at p. 24.

*TAMM, Circuit Judge*: This case comes to us on appeal from an order in the district court denying appellants' (plaintiffs below) petition to convene a three-judge district court pursuant to the provisions of 28 U.S.C. § 2282 (1970), and granting appellee's motion to dis-

miss. For the reasons stated at length below we affirm the action of the district court as it pertained to the individual appellants involved, but as to the corporate appellant reverse and remand for further proceedings consistent with this opinion.

## I. BACKGROUND

Appellant Americans United, incorporated as "Protestants and Other Americans for Separation of Church and State," is organized under the laws of the District of Columbia and is a nonprofit educational corporation. On July 3, 1950, the Commissioner of Internal Revenue issued a ruling that Americans United qualified as tax exempt under § 101(6) of the Internal Revenue Code of 1939, the predecessor to § 501(c)(3) of the 1954 Code.<sup>1</sup> Consequently, for a period of nearly twenty years not only was Americans United free from taxation upon its income, but also contributors to the corporation were entitled to the deductions provided under § 170 of the 1954 Code (§ 23(q) of the 1939 Code).<sup>2</sup> On April 25, 1969, a letter ruling from the Service revoked the 1950 ruling, holding that Americans United had violated §§ 170(c)(2)(D) and 501(c)(3) of the Code by devoting a substantial part of its activities to attempts to in-

<sup>1</sup> 26 U.S.C. § 501(c)(3) (1970):

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

<sup>2</sup> Organizations which have secured rulings that they are tax exempt under § 501(c)(3) are described in I.R.S. Publication No. 78, *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*. The requirements for §§ 501(c)(3) and 170(c)(2) are nearly identical in every respect.



fluence legislation. More particularly, the letter ruling stated that although part of Americans United's activities could be classified as "educational" or "charitable" within the meaning of § 501(c) (3) of the Code, it was, nonetheless, an "active advocate of a political doctrine." The majority of the corporation's activities were held to be in furtherance of the following goals: "the mobilization of public opinion; resisting every attempt by law or the administration of law which widens the breach in the wall of separation of church and state; working for the repeal of any existing state law which sanctions the granting of public aid to church schools; and uniting all 'patriotic' citizens in a concerted effort to prevent the passage of any federal law allotting, directly or indirectly, federal education funds to church schools."

While Americans United still retained a tax exempt status as an organization described in § 501(c) (4) of the Code,<sup>3</sup> the removal of its § 501(c) (3) exemption allegedly proved to be most damaging. Americans United states that its resulting removal from the list of § 170 corporations to whom tax free contributions could be made dried up its well of contributory resources to such an extent that it operated at a deficit for the first time in its history during fiscal year 1970. Consequently, on July 30, 1970, this action was commenced in the United States District Court for the District of Columbia. Two individual plaintiffs, Archer and Lowell, apparently suing as taxpayers who intended in the future to contribute to Americans United, joined with Americans United in bringing the class action.

The amended complaint in the district court averred violations of various first and fifth amendment liberties

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<sup>3</sup> 26 U.S.C. § 501(c) (4) (1970):

Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

and guarantees: (1) §§ 170 and 501, and the action of the Commissioner in giving force and effect thereto, were unconstitutional and void insofar as they denied § 501 (c) (3) status to the corporate appellant by reason of its exercise of first amendment rights, and likewise denied individual appellants the privilege of deducting the contributions used as a vehicle to exercise their first amendment rights. (2) Since what was a "substantial part" in the case of Americans United was not a "substantial part" in the case of other, larger organizations opposed to appellants' viewpoint, the change of status because of the substantiality of the activities of one organization as opposed to another in expressing opinions and influencing legislation was an unreasonable classification against Americans United, and by reason thereof Americans United and other organizations similarly situated were being discriminated against and denied equal protection of the laws in violation of the fifth amendment of the United States Constitution. (3) Appellants claimed that their tax dollars were being used by reason of §§ 170 and 501 in a manner that aided and strengthened churches whose size permitted their influencing of legislation to be "relatively less substantial than that of the corporate [appellant]," and that appellee's actions in enforcement thereof constituted violations of the establishment and free exercise clauses of the first amendment. (4) The exemption clause of § 501(c) (3) amounted to an invalid delegation of legislative power "in that the statutory standards of 'substantiality' and 'propaganda' [were] lacking in specificity for the carrying out of the purpose of Section 501(c) (3)." (5) Finally, the defendant acted arbitrarily and capriciously in abuse of his discretion in applying, in this situation, the "substantial influencing" clause of the statutory exemption of § 501 (c) (3).

Appellants' complaint founded jurisdiction for the action upon 28 U.S.C. § 1331 (1970) (civil action where amount in controversy exceeds \$10,000 and which arises under the Constitution and laws of the United States), 28 U.S.C. § 1340 (1970) (whereby jurisdiction is bestowed in the federal district court in any civil action

arising under an Act of Congress providing for internal revenue), and § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1970) (making final agency action subject to judicial review). Appellants also sought the convention of a three-judge district court pursuant to 28 U.S.C. §§ 2282<sup>4</sup> and 2284 (1970), and requested the following relief: (1) Declaratory judgment that the "exemption clauses of Section 501(c) (3) [were] separable from the remainder of the section and [were] null and void" as unconstitutional under the first and fifth amendments, and as an invalid delegation of legislative power.<sup>5</sup> (2) Judgment "requiring" the appellee to "reevaluate" corporate appellant as a § 501(c) (3) charitable corporation and to reinstate corporate appellant on the *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*, if found to be eligible under the newly constituted § 501(c) (3). (3) Judgment restraining the appellee from enforcing §§ 170(c) and 501(c) (3) so as to deprive the individual appellants "of the benefit of tax advantages in the exercise of their First Amendment rights by reason of the unconstitutionality of those sections." (4) Judgment that appellee acted in an arbitrary and capricious manner in changing the status of corporate appellant. (5) In the alternative, judgment requiring appellee to reopen the revocation

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<sup>4</sup> 28 U.S.C. § 2282 (1970):

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

<sup>5</sup> In this manner the appellants seek to continue the viability of § 501(c) (3) without the challenged "substantial part" exception to the exemption. As the Court of Appeals for the Tenth Circuit has recently stated: "Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provisions containing the discriminatory underinclusion as generally invalid, or whether to extend the coverage of the statute." *Moritz v. Commissioner*, No. 71-1127 (November 27, 1972), at p. 8. Cf. *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring), and *Skinner v. Oklahoma*, 316 U.S. 535, 542-43 (1942).

proceedings and reevaluate the corporate appellant "in the light of the final decision in this case."

Appellee filed a motion to dismiss, based essentially on 28 U.S.C. § 2201 (1970),<sup>6</sup> which prohibits declaratory judgments "with respect to Federal taxes," and 26 U.S.C. § 7421(a) (1970),<sup>7</sup> which prohibits suits "for the purpose of restraining the assessment or collection of any tax." The trial court denied appellants' petition to convene a three-judge court, finding that no substantial constitutional question was raised, and granted appellee's motion to dismiss, citing *National Council on the Facts of Overpopulation v. Caplin*, 224 F.Supp. 313 (D.D.C. 1963).

Alleging error in both aspects of the trial court's order, appellants bring this appeal. Contending that no taxes have been assessed or collected, that this is a civil rights rather than tax case, and that they have no other adequate remedy, appellants maintain that the provisions of 26 U.S.C. § 7421(a) (1970) and 28 U.S.C. § 2201 (1970) cannot be used to prohibit the declaratory and injunctive relief sought. They further contend that they have raised substantial constitutional questions meriting the invoking of a three-judge court under the standards established in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962). Appellee's posture on appeal

<sup>6</sup> 28 U.S.C. § 2201 (1970):

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

<sup>7</sup> 26 U.S.C. § 7421(a) (1970):

Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The exceptions provided are not applicable to this case.

is somewhat different, of course, and in addition to the grounds listed by the trial judge for dismissing the action he relies upon the doctrine of governmental immunity, claiming this to be an unconsented suit against the United States. *Louisiana v. McAdoo*, 234 U.S. 627 (1914).

## II. JURISDICTION

### 1. *Introduction*

The statutes providing for three-judge "constitutional" courts, adopted to avoid impolitic action on the part of lone federal district judges in matters of broad regulatory scope, are procedural rather than substantively jurisdictional in nature. A complaint which raises substantial constitutional questions and otherwise meets the requirements of § 2282 can and should be dismissed if independent district court jurisdiction is found wanting. "[T]he provision requiring the presence of a court of three judges necessarily assumes that the District court has jurisdiction." *Ex Parte Poresky*, 290 U.S. 30, 31 (1933). This court has held that a dismissal for want of jurisdiction is properly a matter for a single district judge without considering the question of convening a three-judge court. *Eastern States Petroleum Corp. v. Rogers*, 280 F.2d 611 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960). *Accord*, *National Council on the Facts of Overpopulation v. Caplin*, 224 F.Supp. 313 (D.D.C. 1963). The first order of business for the single district judge is simply put (although, as here, not so simply decided): Does the district court have jurisdiction even to consider the applicability of a three-judge panel, or are the plaintiffs out of court for lack of subject matter jurisdiction?

The anti-injunction statute (26 U.S.C. § 7421 (1970)) by its terms denies jurisdiction to "any court" in actions seeking to enjoin the assessment or collection of taxes. If such a statute is applicable here the appellants cannot be afforded the relief requested, regardless of the substantiality of the constitutional questions

raised. See, e.g., *Harvey v. Early*, 160 F.2d 836 (4th Cir. 1947).

Although its legislative history may be "shrouded in darkness,"<sup>8</sup> the *raison d'être* of § 7421(a) was illuminated by Chief Justice Warren in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962):

The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. *In this manner the United States is assured of prompt collection of its lawful revenue.* (Emphasis added, footnote omitted.)

See also *State Railroad Tax Cases*, 92 U.S. 575, 613-14 (1875). Section 7421(a) was thus born of administrative and governmental necessity, used to prevent intermeddling in the tax collection process. An offspring of the equity rule that a suit to enjoin the collection of taxes was not maintainable unless an adequate remedy at law was lacking, its language is much stronger and more encompassing in scope. Even if it can be shown that irreparable injury will result if the collection is effected, § 7421(a) bars a suit for an injunction in the absence of very special circumstances. See *Enochs, supra*, 370 U.S. at 6.

The history of the Declaratory Judgments Act and § 2201 is somewhat different. When initially promulgated in 1934,<sup>9</sup> the phrase "except with respect to federal taxes" was absent from § 2201. Consequently, federal taxpayers (innovative as they are) quickly utilized it to obtain declaratory judgments holding various tax statutes unconstitutional, something they were barred from accomplishing under the anti-injunction statute.<sup>10</sup>

<sup>8</sup> See Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 HARV. L. REV. 109 (1935).

<sup>9</sup> Act of June 14, 1934, ch. 512, 48 Stat. 955.

<sup>10</sup> See, e.g., *Penn v. Glenn*, 40 F.Supp. 483 (W.D. Ky. 1935), *app. dismissed per curiam*, 84 F.2d 1001 (6th Cir. 1936), and *F.G. Vogt & Sons, Inc. v. Rothensies*, 11 F.Supp. 225 (E.D. Pa. 1935). Although both courts refused to grant injunctive relief,

Congress (innovative as it is) quickly reacted and amended § 2201 to include the contentious phrase.<sup>11</sup> The Senate Finance Committee, in reporting out the amended version, stated that the "application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress [as represented today by § 7421(a)] with respect to the determination, assessment, and collection of Federal taxes."<sup>12</sup> Literally broader than § 7421(a) in its preclusion of tax oriented remedies, the § 2201 exception has literally been found coterminous with that provided by § 7421(a). *McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C. 1972). See also *Bullock v. Latham*, 306 F.2d 45 (2d Cir. 1962), and *Tomlinson v. Smith*, 128 F.2d 808 (7th Cir. 1942). We believe that to be a correct interpretation, one soundly based on the history of the exception and on the paradoxicalness of authorizing injunctive relief while depriving courts the authority to declare the rights of the parties in connection with the injunctive relief. The breadth of the tax exception of § 2201 is co-extensive with the effect of § 7421(a), and so the applicability of the latter to our situation is determinative of jurisdiction.

## 2. Individual Appellants

The springboard of the action before us—namely that the removal of Americans United from the status of those corporations to whom tax deductible contributions can be made has wreaked havoc upon its financial stature—is the same for both the individual and corporate appellants. They seek to keep Americans United afloat. However, the posture of the appellants and the effect that the relief

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they expected the tax collector to "respect the decision." If he did not do so and the taxpayer was forced to sue for a refund, "the trial court would probably be justified in refusing him a certificate of probable cause, and thus he and his bond would be liable for the judgment obtained." 11 F.Supp. at 231. This was a neat circumvention of the anti-injunction statute, but one that Congress did not appreciate.

<sup>11</sup> Act of August 30, 1935, ch. 829, § 405, 49 Stat. 1027.

<sup>12</sup> S. REP. No. 1240, 74th Cong., 1st Sess. 11 (1935).



sought would have upon them is distinctively different. Stripped to its barest essentials, the individual appellants' relief relates directly to the assessment and collection of taxes. They seek, despite their averments that no taxes have been assessed and that this is a civil rights rather than tax case, to enjoin the appellee from assessing or collecting taxes on those dollars contributed by them to Americans United. In paragraph 3 of the relief portion of appellants' amended complaint this becomes evident:

[Plaintiffs pray that the following relief be granted:] Judgment enjoining defendant Thrower from enforcing Sections 170(c) and 501(c)(3) of Title 26 U.S.C.A., so as to deprive the individual plaintiffs and others similarly situated of the benefit of tax advantages in the exercise of their First Amendment rights by reason of the unconstitutionality of those sections.

The allegations that the tax will be assessed and collected in violation of their constitutional rights is to no avail. See *Dodge v. Osborn*, 240 U.S. 118 (1916); *Harvey v. Early*, 160 F.2d 836 (4th Cir. 1947); *Moon v. Freeman*, 245 F.Supp. 837 (E.D. Wash. 1965); *National Council on the Facts of Overpopulation v. Caplin*, 224 F.Supp. 313 (D.D.C. 1963). The allegation that no tax has as yet been assessed and that therefore the action is somehow without §7421(a), we find to be equally without merit. In the words of Chief Judge Sirica in *National Council*, *supra*, 224 F.Supp. at 314, "[t]he Court cannot agree that the immunity of a tax assessment from court-imposed restraint has anything to do with the timing of that restraint." Finally, the individual appellants have not shown the high probability of success on the merits that warrants the non-application of §7421(a) under the standards enunciated in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962):

[I]f it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and under the *Nut Margarine* case, [*Miller v. Standard Nut Margarine*



Co., 284 U.S. 498 (1932)], the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in "the guise of a tax." *Id.*, at 509.

We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim may the suit for an injunction be maintained.

The action brought and the relief sought by the individual appellants directly ranges within the ambit of § 7421(a), and as to them the action of the district court in dismissing the case was correct.

### 3. *Corporate Appellant*

Americans United, at the present time exempt from taxation on income by virtue of 26 U.S.C. § 501(c)(4) (1970), does not seek in this lawsuit to enjoin the assessment or collection of its own taxes. Because of the "tax breaks" attendant to contributions to corporations qualifying under § 170(c) of the Code, qualification thereunder is a precious possession and removal from the *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954* is a damaging—sometimes fatal—injury to the financial status of any "charitable" organization. Potential contributors with a minimum of business acumen are careful to get the most for their contributed dollar, and one certain way not to do so is to contribute to non-§ 170 corporations. Appellant, therefore, presented with the dollar dilemma of finding prospective contributors closing their wallets, seeks to have the court restrain the Commissioner from meting § 501(c)(3) and § 170(c) qualifications in the alleged unconstitutional manner. A necessary side effect of any relief, of course, will be to allow contributions which otherwise would be made with after tax dollars to become deductible. Consequently, the appellee

alleges that this is in essence a suit to restrain the assessment or collection of a tax and barred by § 7421(a).

*McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C. 1972), involved a class action brought by a black American denied membership in an Elks Lodge because of his race. The plaintiff sought to enjoin the Secretary of Treasury from granting tax benefits to fraternal and nonprofit organizations which excluded nonwhites from membership. The statutes involved were similar to those in the case before us, granting various exemptions both to the organizations and their contributors. The plaintiff alleged that the statutes were either unconstitutional, unconstitutionally interpreted, or that the benefits granted thereby were in violation of Title VI of the Civil Rights Act of 1964. The defendant moved to dismiss citing §§ 2201 and 7421(a), but a three-judge district court denied the motion. Chief Judge Bazelon, writing for the court, stated:

Plaintiff's action has nothing to do with the collection or assessment of taxes. He does not contest the amount of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States. The preferred course of raising his objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit. To hold otherwise would require the kind of ritualistic construction which the Supreme Court has repeatedly rejected. Even where the particular plaintiff objects to his own taxes, the Court has recognized that the literal terms of the statute do not apply when "the central purpose of the Act is inapplicable." In the present case, the central purpose is clearly inapplicable. It follows that neither § 7421(a) nor the exception to the Declaratory Judgment Act prohibits this suit.

*Id.* at 453-54 (footnotes omitted).

A case from the opposite side of the restraint coin, wherein the Commissioner threatened to remove the tax exempt status of an organization because of racially discriminatory practices, is *Bob Jones University v. Connally*, 341 F.Supp. 277 (D.S.C. 1971). Fearing that a drop in

its level of contributions would cause irreparable harm, the University sought a preliminary injunction restraining the Commissioner from removing its § 501(c)(3) qualification. Faced with identical §§ 2201 and 7421(a) arguments, the district judge granted the injunction. The court found that the gravamen of the plaintiff's complaint was not to ask the court to substitute its views for that of the Commissioner, see *Jolles Foundation, Inc. v. Moysey*, 250 F.2d 166 (2d Cir. 1957), but rather to prevent the Commissioner from acting "beyond the authority granted by the constitution or by the Congress, and to read into the Internal Revenue Laws powers that are not expressly given and that were never intended by Congress." 341 F.Supp. at 282-83. The court went on to state:

If there were no contest as to the legality or the power of the defendants to revoke under existing law plaintiff's tax exempt status because of its admitted racial discriminatory admissions policy, but was instead a case involving the applicability of such a rule to the plaintiff, it would then appear to be a case where this court was asked to preempt discretionary power of a federal office which it would be powerless to do. . . . Plaintiff is not challenging the applicability of the rule, but the legality of the rule itself.

Bob Jones University is not seeking a declaratory judgment, but rather seeks to enjoin the defendants from exercising alleged illegal and *ultra vires* power and authority. Consequently, it is concluded that the levy, assessment, and collection of a tax is not the main issue. Plaintiff does not contest the amount or method of any levy, assessment, or collection, or evidence to be used in making such determination of taxes that might become due. Plaintiff is seeking to enjoin what it contends to be illegal and unconstitutional actions or threatened actions on the part of officials of the United States Government which it claims would lead to irreparable harm . . . .

*Id.* at 283.

Here, as in *Bob Jones*, the essence of appellants' attack is not against the applicability of a test or their ability to qualify under presently existing standards. As the appellee correctly points out in his brief, "[appellants] do not seriously contend that Americans United qualifies under Section 501(c)(3) as written. Rather, they contend that the clause disqualifying organizations which devote a substantial part of their activities to political propaganda and lobbying should be elided as unconstitutional, and they seek a declaratory judgment to that effect."

Appellee principally relies upon *Jolles Foundation, Inc. v. Moysey*, *supra*. Although there is language in *Jolles* regarding § 2201 we believe it to be distinguishable and not persuasive. In *Jolles* the appellant alleged that the Commissioner erred in his determination of its tax exempt qualification, and brought an action which the court correctly viewed as in the nature of mandamus "against the Commissioner to compel him to reverse his position based upon the activities of the Foundation already held not to come within the exemption . . . ." 250 F.2d at 169. We submit that the *Jolles* case did not involve the alleged unconstitutionality of a taxing statute, but a challenge respecting the judgment of the Commissioner, and manifestly "the court cannot presume to speak for the Commissioner or take over his duty to pass upon the tax status of organizations applying for exemption." *Id.*

Here, as in *McGlotten* and *Bob Jones*, no tax has been or will be assessed against the corporate appellant. The restraint upon assessment and collection is at best a collateral effect of the action, the primary design not being to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation. The corporation, alleging constitutional violations of an identical nature to that of the individual appellants, irreparable injury, and an inadequate legal remedy,<sup>13</sup> does so in a posture re-

<sup>13</sup> Since Americans United qualifies as a tax exempt organization pursuant to § 501(c)(4) of the Code, the normal avenue of challenge, tax refund litigation, is not available. Appellee in his Supplemental Memorandum and at oral presentation has for the

moved from a restraint on assessment or collection. We find, as did the courts in *Bob Jones, McGlotten*, and impliedly the court in *Green v. Kennedy*, 309 F.Supp. 1127 (D.D.C. 1970), on permanent injunction, 330 F.Supp. 1150 (D.D.C. 1971), *aff'd per curiam*, 404 U.S. 997 (1971),<sup>14</sup> that it would be an all too encompassing interpretation of § 7421(a) to consider it as precluding a suit of this nature, and refuse to so hold.<sup>15</sup>

first time suggested two additional "adequate" legal remedies available to the appellant corporation. These are the federal social security and unemployment tax refund litigations, since § 501(c) (3) organizations are exempt from both taxes while § 501(c) (4) organizations are exempt from neither.

Appellant points out that although not required to pay social security taxes while exempt under § 501(c) (3), it elected to do so. A termination of such an election requires two years advance notice and cannot be made if the election has been in effect more than eight years, as it was here. Moreover, under 26 U.S.C. § 3121(k) (3) (1970), an organization which once terminates its election to pay those taxes voluntarily cannot renew the election. Although the unemployment tax refund litigation is not fraught with perils of equal magnitude, it is subject to certain conditions and, we feel, is so far removed from the mainstream of the action and relief sought as to hardly be considered adequate.

<sup>14</sup> *Green* involved a class action brought by black students and their parents to enjoin the Secretary of Treasury from granting tax exempt status to private schools discriminating against blacks. A three-judge district court was convened and, Judge Leventhal writing, determined that the Internal Revenue Code could not be interpreted as granting a tax exempt status to such organizations. Although faced with governmental insistence that the relief sought was barred by §§ 2201 and 7421(a), the court did not address the problem but granted the injunctive relief. The case was affirmed *per curiam* and without opinion by the Supreme Court, but as by that time the Commissioner had "voluntarily" altered the rules to comply with the decision, and the government did not press the appeal, the precise force and effect of the affirmance is questionable.

<sup>15</sup> The ultimate effect of the *Green* and *McGlotten* litigations was to increase the tax revenue of the United States, while at least theoretically the effect of *Bob Jones* and the case at hand is to decrease the tax revenue. We do not believe, and appellee has in fact agreed, that such a fact is of distinguishable merit. It is untenable that a party seeking to have an entire section declared unconstitutional, thus removing the exemption and theoretically increasing the tax revenue, should be treated differently from one seeking

We do not adopt the doctrine that § 7421(a) is inapplicable so long as a party does not seek to restrain the collection or assessment of its own taxes. Our holding is much narrower. In those situations where a non-taxpayer sues in the stead of the taxpayer,<sup>16</sup> e.g., the shareholder suits brought on behalf of a reluctant corporation, *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U.S. 455, 464 (1903), cf., *Helvering v. Davis*, 301 U.S. 619, 639-40 (1937), or where the tax itself directly operates to place a financial burden upon the non-taxpayer,<sup>\*</sup> e.g., where the valuation of an estate for estate tax purposes would affect the tax liability of a non-taxpayer at a future date, *West Chester Feed & Supply Co. v. Erwin*, 438 F.2d 929 (6th Cir. 1971), when a tax levied upon processing oil would directly affect one about to enter the processing business, *Gardner v. Helvering*, 88 F.2d 746 (D.C. Cir. 1936), cert. denied, 301 U.S. 684 (1937), *au fond* it is a suit to restrain the collection or assessment of a tax "indirectly" levied upon the plaintiff, and within the purpose and proscription of § 7421(a).

What we have then is a hybrid sort of fellow. The challenge upon which we reverse runs not to the exercise of discretion or the everyday working affairs of the Com-

to remedy the discriminatory underinclusion by striking the unconstitutional clause, and thus theoretically decreasing the tax revenue.

In reaching our conclusion regarding the applicability of § 7421(a) we have considered, and found unpersuasive, the decisions in *Liberty Amendment Committee of the U.S.A. v. United States*, Civ. No. 70-721-HP (C.D. Cal. June 19, 1970), *aff'd per curiam*, No. 26,507 (9th Cir. July 7, 1972), and *Crenshaw County Private School Foundation v. Connally*, 343 F.Supp. 495 (M.D. Ala. 1972).

<sup>16</sup> Arguably Americans United's purpose could be that of "representing" its remaining contributors who now face the assessment of taxes on their contributed dollars—a sort of "end run" maneuver to avoid the proscriptions of § 7421(a) that we have found to apply to suits brought by those contributors—but we do not believe such to be a realistic appraisal of the situation. Americans United is concerned about its own preservation which is threatened not by the indirect burden of the tax upon them, but by the "unconstitutional" action of the Commissioner resulting in the driving of prospective contributors to other "charities."

[\*The word has been changed to reflect the correction made by the court. See p. , *infra*.]

mission, something we feel history and good sense implore us to leave alone, nor is it concerned with taxes levied either directly or "indirectly" upon the corporate appellant, something which § 7421(a) mandates us to leave alone.<sup>17</sup> Finally, an alternate legal remedy in the form of adequate refund litigation is unavailable. The lack of a meaningful alternate form of relief is important herein for two reasons: first, its absence solidifies our belief that the situation *sub judice* is without the purpose and expected scope of § 7421(a), and second, its absence renders equitable relief most appropriate. We suspect that the birthrate of such a hybrid will be so low that the proverbial "flood gates" to judicial review of Internal Revenue Service action will remain closed.

#### 4. Sovereign Immunity

Appellee, relying chiefly upon *Louisiana v. McAdoo*, 234 U.S. 627 (1914), urges the court to recognize this suit as one against the United States to which consent has not been given, and hence barred by the doctrine of sovereign immunity. We feel that the appellee has failed to recognize this suit as rightly falling within the exceptions to the doctrine as reiterated by the Supreme Court in *Dugan v. Rank*, 372 U.S. 609, 622 (1963). Those exceptions relate to (1) actions by officers beyond their statutory powers, and (2) actions within the scope of their authority, when the powers themselves or the manner in which they are exercised are constitutionally void. The appellants do not challenge the right of the Commissioner to adopt rules and regulations, but they do challenge his right to enforce a statute which they assert violates various constitutional liberties. This clearly falls within the "exception" almost as broad as the "rule," that "sovereign immunity does not prevent a suit against a state

<sup>17</sup> Standing to sue and ripeness problems, neither of which we find to preclude the lawsuit before us, could also work to prevent other litigation which arguably would be without the scope of §§ 2201 and 7421(a).



or federal officer who is acting either beyond his authority or in violation of the Constitution." <sup>18</sup>

### III. SUBSTANTIAL CONSTITUTIONAL QUESTION

The single district court judge below denied appellants' motion to convene a three-judge panel pursuant to 28 U.S.C. § 2282 (1970), for the stated reason that the challenge raised no substantial constitutional questions. We reverse and remand with respect to the only remaining appellant in this litigation, Americans United, with instructions to promptly convene a § 2282 panel.

In *Bulluck v. Washington*, No. 24,862 (D.C. Cir. Jan. 19, 1972), *rehearing en banc*. May 31, 1972, we have recently had an opportunity to restate the scope of a district court's inquiry (and consequently our scope of review) when confronted with an application for a § 2282 panel. The court is limited to questioning (1) whether the constitutional questions raised are substantial, which in turn is limited to a determination of whether they are "obviously without merit" or so clearly unsound by reason of previous decisions of the Supreme Court "as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky*, 290 U.S. 30, 32 (1933); (2) whether the complaint at least formally alleges a basis for equitable relief; and (3) whether the case presented otherwise comes within the requirements of the three-judge panel. *Idlewild Bon Voyage Corp. v. Epstein*, 370 U.S. 713, 715 (1962).

<sup>18</sup> K. Davis, *ADMINISTRATIVE LAW TREATISE* 522 (1958). Professor Davis treats *Ex Parte Young*, 209 U.S. 123 (1908), as the "foundation case" for such a rule:

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

*Id.* at 159-160. See also *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304-05 (1952).



As our discussion of the case to this point has shown, what appellant effectively seeks here is a restraint on the enforcement of the "substantial part" clause of § 501(c) (3). It accomplishes this by seeking a declaratory judgment that the section is unconstitutional, and by requesting injunctive relief to force the Commissioner to reclassify it and other similarly situated corporations as tax exempt if they are found to qualify. This type of action, affecting legislation of broad regulatory scope and amounting to a restraint on its enforcement as written and interpreted, is within the § 2282 mandate. Satisfied that the other requirements for the three-judge panel are present, and that equitable relief is properly requested, we turn to the substantiality question.

Although as can be seen from our earlier listing<sup>19</sup> appellants originally raised a multitude of possible constitutional violations, at oral argument and in its Reply Brief it has narrowed its focus, and we believe wisely so, to the "discriminatory" aspects of § 501(c) (3). Basically, this is that since larger, wealthier organizations can engage in conduct identical to that of appellant without, because of their size, falling within the "substantial part" category of § 501(c) (3) and hereby losing their precious tax exempt status (and more precious listing among those corporations to whom tax free contributions can be made), § 501(c) (3) is unconstitutionally discriminatory in violation of the equal protection ramifications of the due process clause of the fifth amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).<sup>20</sup> We find such a claim, novel as it may be, neither obviously without merit nor foreclosed by previous Supreme Court decisions.

<sup>19</sup> See pp. 4-5, *supra*.

<sup>20</sup> It is true that in *Helvering v. Lerner Stores Co.*, 314 U.S. 463, 468 (1941), Justice Douglas wrote that "[a] claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause." The great weight of authority today, however, as exemplified by *Bolling*, *Schneider v. Rusk*, 377 U.S. 163 (1964), and *Shapiro v. Thompson*, 394 U.S. 618 (1969), is that "[w]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" 377 U.S. at 168.

Appellee relies chiefly upon *Cammarano v. United States*, 358 U.S. 498 (1959), but *Cammarano*, while disposing of appellants' claim that first amendment rights are violated by the questioned statute, does not attempt to deal with possible discriminatory conduct. In *Cammarano* liquor dealers had expended funds in advertising campaigns against statutory resolutions in Washington and Arkansas which would have effectively closed their businesses, and sought to deduct their costs as ordinary business expenses. The lower courts ruled that "the payments . . . were 'expended for . . . the . . . defeat of legislation' within the meaning of Treas. Reg. 111, § 29.23 (0)-1 and were therefore not deductible as ordinary and necessary business expenses under § 23(a)(1)(A) of the Internal Revenue Code of 1939." *Id.* at 501. The court, per Mr. Justice Harlan \* continued:

Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "aimed at the suppression of dangerous ideas."

*Id.* at 513. Americans United, on the other hand, alleges just that discriminatory conduct found lacking in *Cammarano*. This discrimination relates solely to the "size" of the organization, which appellants allege is directly related to its wealth and power structure, and comes into play during and because of the exercise of first amendment protected liberties. By allowing larger, richer organizations more "dollar punch" in terms of "propagandizing" and "influencing legislation" before their respective activities are considered "substantial," the Commissioner is accused of following the mandate of

[\* The name of the Justice has been changed to reflect the correction made by the court. See p. , *infra*.]

§ 501(c) (3) and treating identical activity differently, solely on the basis of the size, or wealth, of the acting party.

Nearly every jurist and attorney today is aware of the flood of cases before the bench raising important questions, at least in the context of the fourteenth amendment equal protection clause, concerning the interpretation of "fundamental rights," "suspect categories," and their resultant "compelling state interest test." A case similar to the redoubtable *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), which struck down California's system of public school financing as violative of the fourteenth amendment, and straightforwardly classified both "wealth" and "education" as categories calling for stricter justification in terms of equal protection, is presently submitted before the United States Supreme Court. *San Antonio Independent School District v. Rodriguez*, No. 71-1332 (argued 10/12/71, 41 U.S.L.W. 3197). The Court's decision in that case should prove most instructive in an area of concern before us—"discrimination" of this type as within the "wealth" category, and the status of "wealth" as giving rise to the compelling interest test.

If discrimination exists here it relates to the exercise of the most fundamental of rights, those protected by the first amendment,<sup>21</sup> and raises questions concerning the directness of its relationship to wealth. We are aware that the various tests of which we speak have arisen in the context of the fourteenth amendment, but find that they are nonetheless relevant to the considera-

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<sup>21</sup> See dissent of Marshall, J., in *California v. LaRue*, 41 U.S.L.W. 4039, 4048 (December 5, 1972), for discussion of classifications based on speech. See also *Speiser v. Randall*, 357 U.S. 513 (1958), a case which although decided on procedural due process grounds discussed the effect of tax exemptions:

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

*Id.* at 518.

tion of whether the government has exercised its taxing powers in such a discriminatory fashion as to violate the due process guaranties of the fifth amendment. This is neither a frivolous challenge nor one which, as of the writing of this opinion, has been foreclosed by the Supreme Court.

We want to stress that our opinion is in no way meant to state our views of the merits of this case beyond that required: namely, that the possibility of success is not so certain as to merit the *Enochs* exception with respect to § 7421(a), yet not so frivolous or foreclosed as to merit denial of the § 2282 motion. The discrimination problem may ultimately prove to be a mirage, or even a muddle, but it certainly is not maggot-pated. The question merits a three-judge panel.

*Reversed and remanded for further proceedings consistent with this opinion.*

WILKEY, *Circuit Judge*, concurring: I concur unreservedly in Judge Tamm's opinion for the court, all the more willingly because his opinion is a model of lucidity in a field of law—taxation—in which that quality is as rarely found in either judicial decisions or legislation as sunlight on the dark side of the moon.

Since we have decided no issue on the merits, except that the constitutional issues are sufficiently serious to require decision by a three-judge court, I believe it appropriate to raise a question for the consideration of the three-judge court which was not briefed by the parties and is not dealt with by our court's opinion.

As I see it, the basis of our decision here is that there is a substantial constitutional question because the challenged tax provision discriminates on the basis of wealth (size), and because the Supreme Court is currently considering cases which may say that such distinctions need to be closely analyzed. Although other statutes are relevant, the vital statute at issue is 26 U.S.C. § 501(c) (3) (1970), quoted in footnote one of the court's opinion. Making a careful analysis of this statute, the first part

states why tax exemption is granted—and that relates to the *purpose* of the organization. Thereafter are listed several factors which will nullify the tax-exempt status granted by the first part of § 501(c)(3). One of the disqualifications for tax-exempt status is expressed in the phrase, "... no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, ..."

And this disqualification phrase is what this case is all about. 26 U.S.C. § 501(c)(3) *first* ties tax status to the *purpose* of the organization—and the "no substantial... influence legislation" disqualification test (like the disqualification reference to private earnings or political campaigns) *is aimed at assuring some purity in that purpose.*

It is arguable that a small organization that spends almost all of its funds lobbying is not organized or conducted for the same purpose as a large organization, which may spend quantitatively as much, but which proportionately devotes most of its activities to unquestionably exempt purposes. If we make an analysis by following the impact of the donor's dollar, a gift to "Americans United" has "more punch" on the legislative front than a gift to a large church organization which spends only 1% of its income on lobbying activities.

In that sense, the large organization is not engaged in what can reasonably be called "identical conduct." The statute does not give any greater privilege of speech to large organizations—other than the greater amount of impact any group can have if it raises more money. Rather, the interpretation of equal protection sought by "Americans United" would give a greater right of speech—by emasculating the "purpose" rationale of § 501(c)(3)—to small organizations. We cannot ignore the "purpose" rationale, because *purpose* is the *only* ground for tax exemption under § 501(c)(3).

Furthermore, if the larger groups are seen as engaged in "identical conduct"—what is to be the bench mark? If the purpose of the tax statute is to be preserved at all, then the large church organizations probably must hold to devoting a small percentage of their resources

to lobbying. Is that *quantitative* amount then to guide—so that a small organization, with total funds amounting only to the tiny percentage which the large organization devotes to this purpose, could devote 100% of its funds to lobbying and still be exempt?

In short, it is certainly arguable that small groups are not being treated differently by § 501(c) (3) because they are small, but because they are obviously operating for a different purpose if they devote their comparatively small funds on a much different proportionate basis to propaganda for legislation.

I have raised the issue above by stating only one side of the argument. There are, of course, counterarguments.<sup>1</sup> We are not here deciding this or any other issue on the merits, but since neither party has seen fit to bring this issue to the courts' attention, I feel it of sufficient importance to raise it for such consideration as the three-judge court and parties may wish to give it.

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<sup>1</sup> Some counterarguments may be derived from William G. Halby's article, "Is the Income Tax Unconstitutionally Discriminatory?", 58 A.B.A.J. 1291 (December, 1972). Others may be inspired by the reflection that, if 200 years ago man revolted on the principle that "Taxation without representation is tyranny", then today men may rise in righteous wrath because taxation with representation but beyond human comprehension is even worse.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

Civil Action 2269-70

No. 71-1299

[Filed Jan. 11, 1973, United States Court of Appeals for  
the District of Columbia Circuit, Hugh E. Kline Clerk]

"AMERICANS UNITED" INC., ET AL., APPELLANTS

v.

JOHNNIE M. WALTERS,  
Commissioner of Internal Revenue

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Before: Fahy, Senior Circuit Judge, Tamm and  
Wilkey, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and this case is hereby remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam  
For the Court

/s/ Hugh E. Kline  
HUGH E. KLINE  
Clerk

Opinion by Circuit Judge Tamm.  
Concurring opinion by Circuit Judge Wilkey  
Dated: January 11, 1973

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SEPTEMBER TERM, 1972

Civil Action 2269-70

No. 71-1299

[Filed Apr. 30, 1973, United States Court of Appeals for  
the District of Columbia Circuit, Hugh E. Kline, Clerk]

"AMERICANS UNITED" INC., ET AL., APPELLANTS

v.

JOHNNIE M. WALTERS,  
Commissioner of Internal Revenue

Before: Fahy, Senior Circuit Judge, Tamm and  
Wilkey, Circuit Judges

ORDER

It is ORDERED *sua sponte* by the Court that the  
opinion of January 11, 1973 is amended as follows:

Page 18, line 5 will now read:

burden upon the non-taxpayer, *e.g.*, where the valuation of an

Page 22, line 17 will now read:

1939." *Id.* at 501. The Court, per Justice Harlan,

Per Curiam  
For the Court

/s/ Hugh E. Kline  
HUGH E. KLINE  
Clerk



SUPREME COURT OF THE UNITED STATES

No. 72-1371

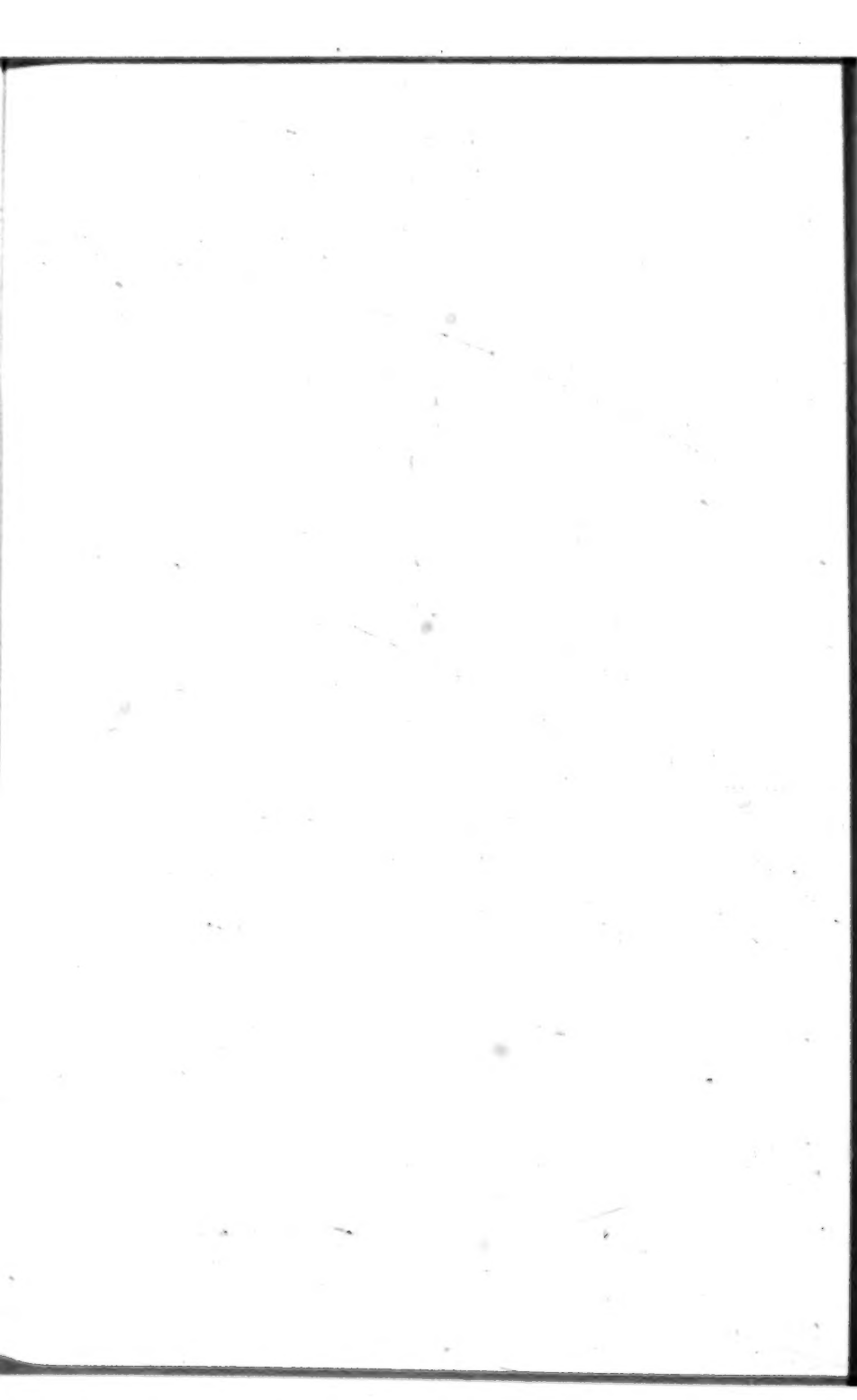
JOHNNIE M. WALTERS,  
Commissioner of Internal Revenue, PETITIONER

v.

"AMERICANS UNITED" INC., ET AL.

ORDER ALLOWING CERTIORARI—Filed June 4, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.



No.

**72 - 1371**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1972**

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**JOHNNIE M. WALTERS, COMMISSIONER OF  
INTERNAL REVENUE, PETITIONER**

**v.**

**"AMERICANS UNITED"-INC., ETC., et al.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT**

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**ERWIN N. GRISWOLD,  
*Solicitor General,***

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*Assistant Attorney General,***

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1972**

---

No.

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**JOHNNIE M. WALTERS, COMMISSIONER OF  
INTERNAL REVENUE, PETITIONER**

**v.**

**"AMERICANS UNITED" INC., ETC., et al.**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT**

---

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

**OPINIONS BELOW**

The opinion of the district court (Appendix A, *infra*, pp. 15-16) is not officially reported, but is unofficially reported at 27 A.F.T.R. 2d 884. The opinion of the court of appeals (Appendix B, *infra*, pp. 17-43) is not yet officially reported, but is unofficially reported at 31 A.F.T.R. 2d 582.

## JURISDICTION

The judgment of the court of appeals was entered on January 11, 1973 (Appendix C, *infra*, pp. 44-45). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

The corporate respondent ("respondent") had an advance ruling recognizing its exemption from income taxes pursuant to Section 501(c)(3) of the Internal Revenue Code of 1954 and assuring its contributors of deductibility of their contributions under Section 170(c)(2). In 1969, the Commissioner withdrew the exemption ruling on the ground that the respondent had engaged in lobbying activities prohibited by Sections 170(c)(2) and 501(c)(3), and then issued a ruling under Section 501(c)(4) recognizing respondent's exemption from tax but not assuring deductibility of contributions. The question presented is:

Whether the respondent is barred by the Anti-Injunction (26 U.S.C. 7421(a)) and the Declaratory Judgment (28 U.S.C. 2201-2202) Acts from obtaining injunctive or declaratory relief requiring the Commissioner to issue a ruling that respondent is exempt under Section 501(c)(3), thus ensuring its eligibility for tax-deductible contributions under Code Section 170(c)(2).

### STATUTES INVOLVED

The relevant provisions of the Internal Revenue Code and the Declaratory Judgment Act are set forth in Appendix D, *infra*, pp. 46-50.

### STATEMENT

The respondent is organized under the laws of the District of Columbia as a nonprofit, educational corporation. (J.A. 10.)<sup>1</sup> On July 3, 1950, the Commissioner issued a ruling recognizing that respondent qualified for tax exemption under Section 101(6) of the Internal Revenue Code of 1939, the predecessor of Section 501(c)(3) of the 1954 Code. (J.A. 4, 11.) As a result of this ruling, contributors to the respondent were assured that their contributions would be deductible under Section 23(o)(2) of the 1939 Code, and later under Section 170(c)(2) of the 1954 Code. On April 25, 1969, the Commissioner, by letter ruling, revoked the 1950 ruling on the ground that the respondent had violated Sections 170(c)(2)(D) and 501(c)(3) and the applicable Regulations by devoting a substantial part of its activities to attempts to influence legislation. (J.A. 4-7.)

The respondent is still exempt from income taxes as a "social welfare" organization under Section 501(c)(4) of the Code, in spite of the withdrawal of the tax exemption ruling under Section 501(c)(3). (Appendix B, *infra*, p. 19.) Organizations which are

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<sup>1</sup> "J.A." references are to the Joint Appendix filed in the court of appeals.



exempt from tax under Section 501(c)(4), however, are not eligible for tax-deductible contributions under Section 170. In addition, organizations exempt from tax under Section 501(c)(3) are exempt from the payment of unemployment (F.U.T.A.) taxes under Sections 3301 and 3306(c)(8) of the Internal Revenue Code of 1954, while organizations which are tax-exempt under Section 501(c)(4) are liable for these taxes. The Internal Revenue Service advises that the corporate respondent began paying F.U.T.A. taxes in February, 1970, and has continued making payments regularly since that time.<sup>2</sup>

On July 30, 1970 (J.A. 2), the respondent and two of its benefactors filed suit seeking injunctive and declaratory relief which would declare the Commissioner's administration of the lobbying proscriptions in Sections 170 and 501(c)(3) to be erroneous or unconstitutional, and which would require reinstatement of the respondent's former 501(c)(3) ruling. The respondent brought the suit on behalf of itself, its members, and "all other similarly situated non-profit corporations which have lost or are being threatened by a loss of their status as 501(c)(3) organizations \* \* \*." The individual respondents sued in their own behalf and in behalf of "all other Federal income taxpayers similarly situated." (J.A. 11.)

In the Amended Complaint, it was first alleged (J.A. 11) that the Commissioner's administration of the

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<sup>2</sup> For example, a payment of \$981.13 was made on February 19, 1970.

statutory lobbying proscriptions violated the Due Process rights of the respondent and other similarly situated organizations. The thrust of this allegation, which was given primary emphasis on appeal (Appendix B, *infra*, pp. 20, 37), was that the Commissioner unconstitutionally allows large tax-exempt organizations to engage in a greater absolute number of political activities than it allows to smaller organizations, since the amount of political activities allowed before the prohibited "substantial" level is reached is measured in proportion to the organizations' total activities. It was also alleged that this application of the "substantial" political activities test violates the rights of the individual respondents under the religion clauses of the First Amendment, since large churches are thereby allowed to engage in a greater number of political activities than are small organizations such as the corporate respondent. In addition, it was alleged that the respondent is an "'active advocate of a political doctrine"—namely, an advocate of the religious clauses of the First Amendment," and that the Commissioner's application of the substantial political activities prohibition in Section 501(c)(3) to the respondent and similarly situated organizations violates the rights of the members of these organizations to freedom of speech, freedom of the press, and freedom to petition for redress of grievances. (J.A. 11-12.) Finally, it was alleged that the statutory words "substantial" and "propaganda" in Section 501(c)(3) constitute an "invalid unconstitutional delegation of legislative power" in that they

are "lacking in specificity \* \* \*" and "devoid of meaning and inadequate as a standard for administrative action." (J.A. 13.)

The Amended Complaint concluded by asserting that the corporate respondent had no adequate remedy at law since no taxes had been assessed as a result of the revocation of the ruling under Section 501 (c)(3) and, therefore, the respondents were not seeking a refund of taxes. It also stated that irreparable injury would be suffered if relief were not granted since "As a result of \* \* \* [petitioner's] action the \* \* \* [respondent] has operated at a loss for the year 1970, for the first time since 1949." (J.A. 13.)

As relief, respondents requested. (1) that the court issue a declaratory judgment that "the exemption clauses of Section 501(c)(3) are separable from the remainder of the section and are null and void"; (2) that the Commissioner be enjoined "from enforcing Sections 170(c) and 501(c)(3) \* \* \* so as to deprive the individual \* \* \* [respondents] and others similarly situated of the benefit of tax advantages in the exercise of their First Amendment rights"; and (3) that the Commissioner be required to reevaluate the withdrawal of the respondent's ruling "in the light of the final decision in this case." (J.A. 13-14.) In order to secure this relief, the convening of a three-judge court was requested. (J.A. 13.)

The district court held that the suit was barred by the Anti-Injunction and Declaratory Judgment Acts and dismissed it for lack of jurisdiction. (Appendix

A, *infra*.) The court of appeals held that the action could not be brought by the individual respondents, since they sought relief which would enjoin the Commissioner from assessing taxes on those dollars contributed to the corporate respondent, which relief was barred by the Anti-Injunction Act. (Appendix B, *infra*, pp. 26-28.) With respect to the corporate respondent, however, the court held that the suit was not barred by the Anti-Injunction and Declaratory Judgment Acts. It stated that those jurisdictional prohibitions were inapplicable because (1) it was alleged that the substantial political activities test was unconstitutional; (2) the respondent would sustain injury and could not raise its claims in a refund suit; and (3) the "primary design" of the suit is to prevent diversion of contributed funds away from the organization, the suit does not "directly or 'indirectly'" concern taxes levied upon the organization, and "The restraint upon assessment and collection is at best a collateral effect." (Appendix B, *infra*, pp. 31-32.)

#### REASONS FOR GRANTING THE WRIT

The decision below constitutes a serious threat to federal tax administration in general, and to the advance rulings program in particular, in that it allows pre-assessment judicial review in spite of the explicit prohibitions on injunctive and declaratory suits in tax cases. The decision unduly limits this Court's decision in *Enochs v. Williams Packing Co.*, 370 U.S. 1, and is in conflict with the decisions of several courts of appeals.

1. Section 7421(a) of the Internal Revenue Code (popularly known as the Anti-Injunction Act) provides, with exceptions not here relevant, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court \* \* \*." Similarly, the Declaratory Judgment Act is expressly limited to exclude suits "with respect to Federal taxes." 28 U.S.C. 2201. (Appendix D, *infra*, pp. 49-50.) These prohibitions are designed to protect the collection of the revenue by channelling all judicial review of the tax administration activities of revenue officials into the Congressionally authorized vehicles, such as the suit for refund (28 U.S.C. 1346) and proceedings in the Tax Court (Sections 6212 and 6213 of the Code).

In *Williams Packing, supra*, this Court held that in order to avoid the prohibition against suits to restrain the collection of taxes, the complainant must show, in addition to the presence of irreparable damage, that "under no circumstances" can the government prevail on the merits of its claim. 370 U.S. at 7. In the instant case the court of appeals has in effect restrained the assessment and collection of F.U.T.A. taxes which the corporate respondent owes as an organization exempt under Section 501(c)(4), and has held that the jurisdictional prohibitions in the Anti-Injunction and Declaratory Judgment Acts do not apply if the primary effect of the suit is to ensure the continuing flow of tax-deductible contributions to the tax-exempt organization, rather than to lower the organization's own tax liabilities. In

these circumstances, the court held, the complainant need not make the showing required in *Williams Packing*. (Appendix B, *infra*, pp. 33-34.) There is no support for this holding, we submit, in the language or legislative history of the Anti-Injunction and Declaratory Judgment Acts, and the decision is at odds with those of all other courts which have considered the issue.

2. The decision here is in conflict with decisions of the Second, Fourth, Fifth and Ninth Circuits. In *Bob Jones University v. Shultz*, decided January 19, 1973 (No. 72-1075, C.A. 4), petition for rehearing denied, March 21, 1973, a school sought to enjoin the Commissioner from withdrawing its deductibility assurance and tax-exemption rulings under Sections 170(c)(2) and 501(c)(3). The court held that the suit was barred by the Anti-Injunction Act, as interpreted by this Court in *Williams Packing*, even though it recognized that the complainant might sustain irreparable injury because of the reduction in contributions which would follow withdrawal of its ruling. Subsequent to the appellate decisions in the instant case and in *Bob Jones*, the Fifth Circuit, on facts virtually identical to those in *Bob Jones*, noted the conflict of views reflected in the decisions here and in *Bob Jones* and determined to follow the holding of the latter case. In *Crenshaw County Private School Foundation v. Connally*, decided March 14, 1973 (No. 72-2775, C.A. 5), the court held that the educational organization's suit for reinstatement of its tax exemption and deductibility assurance ruling



was barred by the Anti-Injunction Act.<sup>3</sup> The decision in the instant case is also in conflict with those in *Jolles Foundation v. Moysey*, 250 F. 2d 166 (C.A. 2), and *Liberty Amendment Committee of the U.S.A. v. United States*, decided June 19, 1970 (C.D. Cal., No. 70-721-HP), affirmed *per curiam* July 7, 1972 (No. 26,507, C.A. 9), certiorari denied, December 18, 1972, No. 72-545.<sup>4</sup>

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<sup>3</sup> In *Bob Jones and Chenshaw*, the complainant organizations, subsequent to the loss of their 501(c) (3) status, did not retain their tax exemptions under 501(c) (4), as did respondent in the instant case. Consequently, the irreparable injury they might suffer as a result of lost contributions would continue only until a suit was brought testing an assessment made against the organizations themselves. Here, respondent contends, it will never be able to bring a refund or Tax Court action to test the validity of the loss of its 501(c) (3) exemption and the consequent loss of its deductibility assurance ruling because it retains an exemption from income taxes under Section 501(c) (4). The Fourth Circuit noted this purported distinction in denying taxpayer's petition for rehearing in *Bob Jones*. The distinction is immaterial, however, because, as noted above, the loss of respondent's 501(c) (3) status has resulted in its liability for F.U.T.A. taxes, and it can raise the issues it would prematurely raise here in a suit for refund of those taxes.

<sup>4</sup> The opinions of the district court and of the court of appeals are not reported, but are printed herewith as Appendix E, *infra*, pp. 51-55.

In *Liberty Amendment*, substantial lobbying activities by that organization also led the Commissioner to withdraw its deductibility assurance and tax-exemption rulings under Sections 170 and 501(c) (3), and to substitute a tax exemption ruling under Section 501(c) (4). The district court held that the suit was barred by the Declaratory Judgment Act, relying on the *Jolles Foundation* case. The court of appeals affirmed *per curiam* because of a "lack of subject matter

3. The issues here presented are vital to the advance rulings program in the exempt organizations area. The Internal Revenue Service advises that in fiscal 1971 it processed over 16,000 applications for exempt status under Section 501(c)(3), and that more than 300 of these applications were denied.<sup>5</sup> In addition, more than 100 tax-exemption rulings under Section 501(c)(3) which had formerly been issued were withdrawn in 1972. In every situation where unfavorable action was taken on a ruling or ruling application, there were, of course, adverse effects on potential contributors. The decision of the lower court allowing organizations to bring injunctive or declaratory judgment suits at the advance ruling stage in such circumstances, rather than requiring resort to a Tax Court or refund action after proposed

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jurisdiction." (Appendix E, *infra*, pp. 53, 55.) As in the instant case, the government had presented arguments that the statutes named in the complaint did not give the district court subject matter jurisdiction, and that the suit was barred by sovereign immunity. It is not clear whether the affirmance by the court of appeals was based on either or both of these contentions, or whether it rested on the Anti-Injunction or the Declaratory Judgment Act contentions which were also before the court. Consequently, the decision is in conflict with the holding of the appellate court here on either the Declaratory Judgment and Anti-Injunction Acts issue, or the sovereign immunity question, or both. Though we do not rely in this petition on the sovereign immunity issue, we reserve the right to raise that issue on the merits in the event that the petition is granted.

<sup>5</sup> In more than 2,500 cases, the applicants failed to respond to requests for additional information and the rulings were not issued.



or final assessment or collection, would seriously jeopardize the orderly and efficient administration of the advance rulings program. The decision below has a particularly great impact, since the defendant Treasury officials have their official residence in the District of Columbia and any taxpayer in the country could, therefore, bring his suit in that jurisdiction. See 28 U.S.C. 1391(e).

Of even greater potential importance is the likely extension of the lower court's rationale to advance rulings outside the exempt organization area.\* In numerous circumstances, applicants have no direct tax interest in the rulings which they seek. For example, the favorable tax consequences of a corporate reorganization ruling often inure entirely to the shareholders of the corporate parties. Nonetheless, the corporate parties are usually the only taxpayers in a position to request reorganization rulings, since they alone have the necessary information and can make the required representations. The rationale of the appellate court below, though based on the erroneous assumption that respondent has no vehicle for

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\* In *McGlotten v. Connally*, 338 F. Supp. 448 (D.C.D.C.) (opinion on motion to dismiss), and *Green v. Connally*, 330 F. Supp. 1150, affirmed *per curiam* on intervenor appeal *sub nom. Coit v. Green*, 404 U.S. 997, three-judge courts in the District of Columbia held that the Anti-Injunction and Declaratory Judgment Act provisions at issue here do not prevent injunctive or declaratory suits challenging tax administration activities if the effect of the suits is to increase rather than decrease revenues. This issue was not before this Court on the intervenor appeal in *Green*. Appendix B, *infra*, pp. 32-33, fn. 14.

litigating the issue it raises in a post-assessment proceeding (see *supra*, note 3), would appear to allow a corporate applicant to litigate the contents of, or the refusal to issue, an advance ruling in these circumstances, since the corporation's tax liabilities would not be increased by the adverse ruling and it thus could not litigate that ruling in a Tax Court or refund action. The limited personnel resources of the advance ruling program are already overburdened by the increasing demands of taxpayers; suits such as that here would seriously impair the ability of the Internal Revenue Service to process effectively the applications of the greatest possible number of taxpayers. See, e.g., Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, 20 N.Y.U. Institute on Federal Taxation 1, 7-11 (1962).

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

SCOTT P. CRAMPTON,  
*Assistant Attorney General.*

RICHARD B. STONE,  
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APPENDIX A

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA CIRCUIT

No. 2269-70

[Filed March 9, 1971]

"AMERICANS UNITED" incorporated as Protestants  
and Other Americans United for Separation of  
Church and State: Glenn L. Archer and C. Stanley  
Lowell, suing on behalf of themselves and  
other similarly situated, PLAINTIFFS

v.

RANDOLPH W. THROWER, as Commissioner of  
Internal Revenue, DEFENDANT

ORDER

Upon consideration of the plaintiffs' petition to convene a three-judge constitutional court pursuant to the provisions of 28 U.S.C. § 2282, and the defendant's motion to dismiss the above-entitled action, and upon argument of counsel for the plaintiffs and the defendant; it appearing to the Court that the plaintiffs' amended complaint does not raise a substantial constitutional question, it is this 9th day of March, 1971,

Ordered and Adjudged that the plaintiffs' petition to convene a three-judge court in this action be and the same is hereby denied.

It also appears to the Court that the provisions of 26 U.S.C. § 7421 (a) prohibit the injunctive relief sought in the plaintiffs' amended complaint; that the

provisions of 28 U.S.C. § 2201 prohibit the declaratory relief sought therein; and that the Court lacks jurisdiction to grant the relief requested. *National Council on the Facts of Overpopulation v. Caplin*, 224 F. Supp. 313 (D. D.C., 1963). Accordingly, it is further

Ordered and adjudged that the defendant's motion to dismiss be granted and the plaintiffs' complaint is hereby dismissed.

APPENDIX B

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 71-1299

**"AMERICANS UNITED" INC., ET AL, APPELLANTS**

**v.**

**JOHNNIE M. WALTERS, COMMISSIONER OF INTERNAL REVENUE**

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**Appeal from the United States District Court  
for the District of Columbia**

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**Decided January 11, 1973**

*Mr. Alan Morrison, with whom Mr. Franklin C. Salisbury was on the brief, for appellants.*

*Mr. Leonard J. Henzke, Jr., Attorney, Tax Division, Department of Justice, with whom Messrs. Thomas A. Flannery, United States Attorney at the time the brief was filed, and Grant W. Wiprud, Attorney, Tax Division, Department of Justice, were on the brief, for appellee.*

*Before: FAHY, Senior Circuit Judge, TAMM and WILKEY, Circuit Judges.*

*Opinion by Circuit Judge TAMM.*

*Concurring Opinion by Circuit Judge WILKEY, at p. 24.*

**TAMM, Circuit Judge:** This case comes to us on appeal from an order in the district court denying appellants' (plaintiffs below) petition to convene a three-judge district court pursuant to the provisions of 28 U.S.C. § 2282 (1970), and granting appellee's motion to dismiss. For the reasons stated at length below we affirm the action of the district court as it pertained to the individual appellants involved, but as to the corporate appellant reverse and remand for further proceedings consistent with this opinion.

### I. BACKGROUND

Appellant Americans United, incorporated as "Protestants and Other Americans for Separation of Church and State," is organized under the laws of the District of Columbia and is a nonprofit educational corporation. On July 3, 1950, the Commissioner of Internal Revenue issued a ruling that Americans United qualified as tax exempt under § 101(6) of the Internal Revenue Code of 1939, the predecessor to § 501(c)(3) of the 1954 Code.<sup>1</sup> Consequently, for a period of nearly twenty years not only was Americans United free from taxation upon its income, but also contributors to the corporation were entitled to the deductions provided under § 170 of the 1954 Code (§ 23

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<sup>1</sup> 26 U.S.C. § 501(c)(3) (1970):

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office:



(q) of the 1939 Code).<sup>2</sup> On April 25, 1969, a letter ruling from the Service revoked the 1950 ruling, holding that Americans United had violated §§ 170(c)(2)(D) and 501(c)(3) of the Code by devoting a substantial part of its activities to attempts to influence legislation. More particularly, the letter ruling stated that although part of Americans United's activities could be classified as "educational" or "charitable" within the meaning of § 501(c)(3) of the Code, it was, nonetheless, an "active advocate of a political doctrine." The majority of the corporation's activities were held to be in furtherance of the following goals: "the mobilization of public opinion; resisting every attempt by law or the administration of law which widens the breach in the wall of separation of church and state; working for the repeal of any existing state law which sanctions the granting of public aid to church schools; and uniting all 'patriotic' citizens in a concerted effort to prevent the passage of any federal law allotting, directly or indirectly, federal education funds to church schools."

While Americans United still retained a tax exempt status as an organization described in § 501(c)(4) of the Code,<sup>3</sup> the removal of its § 501(c)(3) exemption allegedly

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<sup>2</sup> Organizations which have secured rulings that they are tax exempt under § 501(c)(3) are described in I.R.S. Publication No. 78, *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*. The requirements for §§ 501(c)(3) and 170(c)(2) are nearly identical in every respect.

<sup>3</sup> 26 U.S.C. § 501(c)(4) (1970):

Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.



proved to be most damaging. Americans United states that its resulting removal from the list of § 170 corporations to whom tax free contributions could be made dried up its well of contributory resources to such an extent that it operated at a deficit for the first time in its history during fiscal year 1970. Consequently, on July 30, 1970, this action was commenced in the United States District Court for the District of Columbia. Two individual plaintiffs, Archer and Lowell, apparently suing as taxpayers who intended in the future to contribute to Americans United, joined with Americans United in bringing the class action.

The amended complaint in the district court averred violations of various first and fifth amendment liberties and guarantees: (1) §§ 170 and 501, and the action of the Commissioner in giving force and effect thereto, were unconstitutional and void insofar as they denied § 501(c)(3) status to the corporate appellant by reason of its exercise of first amendment rights, and likewise denied individual appellants the privilege of deducting the contributions used as a vehicle to exercise their first amendment rights. (2) Since what was a "substantial part" in the case of Americans United was not a "substantial part" in the case of other, larger organizations opposed to appellants' viewpoint, the change of status because of the substantiality of the activities of one organization as opposed to another in expressing opinions and influencing legislation was an unreasonable classification against Americans United, and by reason thereof Americans United and other organizations similarly situated were being discriminated against and denied equal protection of the laws in violation of the fifth amendment of the United States Constitution. (3) Appellants claimed that their tax dollars were being used by reason of §§ 170 and 501 in a manner that aided and strengthened churches whose size permitted their influencing of legislation to be "relatively less substantial than

that of the corporate [appellant]," and that appellee's actions in enforcement thereof constituted violations of the establishment and free exercise clauses of the first amendment. (4) The exemption clause of § 501(c)(3) amounted to an invalid delegation of legislative power "in that the statutory standards of 'substantiality' and 'propaganda' [were] lacking in specificity for the carrying out of the purpose of Section 501(c)(3)." (5) Finally, the defendant acted arbitrarily and capriciously in abuse of his discretion in applying, in this situation, the "substantial influencing" clause of the statutory exemption of § 501(c)(3).

Appellants' complaint founded jurisdiction for the action upon 28 U.S.C. § 1331 (1970) (civil action where amount in controversy exceeds \$10,000 and which arises under the Constitution and laws of the United States), 28 U.S.C. § 1340 (1970) (whereby jurisdiction is bestowed in the federal district court in any civil action arising under an Act of Congress providing for internal revenue), and § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1970) (making final agency action subject to judicial review). Appellants also sought the convention of a three-judge district court pursuant to 28 U.S.C. §§ 2282<sup>4</sup> and 2284 (1970), and requested the following relief: (1) Declaratory judgment that the "exemption clauses of Section 501(c)(3) [were] separable from the remainder of the section and [were] null and void" as unconstitutional under the first and fifth amendments, and as an invalid delega-

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<sup>4</sup>28 U.S.C. § 2282 (1970):

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

tion of legislative power.<sup>5</sup> (2) Judgment "requiring" the appellee to "reevaluate" corporate appellant as a § 501(c)(3) charitable corporation and to reinstate corporate appellant on the *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*, if found to be eligible under the newly constituted § 501(c)(3). (3) Judgment restraining the appellee from enforcing §§ 170(c) and 501(c)(3) so as to deprive the individual appellants "of the benefit of tax advantages in the exercise of their First Amendment rights by reason of the unconstitutionality of those sections." (4) Judgment that appellee acted in an arbitrary and capricious manner in changing the status of corporate appellant. (5) In the alternative, judgment requiring appellee to reopen the revocation proceedings and reevaluate the corporate appellant "in the light of the final decision in this case."

Appellee filed a motion to dismiss, based essentially on 28 U.S.C. § 2201 (1970),<sup>6</sup> which prohibits declaratory

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<sup>5</sup> In this manner the appellants seek to continue the viability of § 501(c)(3) without the challenged "substantial part" exception to the exemption. As the Court of Appeals for the Tenth Circuit has recently stated: "Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provisions containing the discriminatory underinclusion as generally invalid, or whether to extend the coverage of the statute." *Moritz v. Commissioner*, No. 71-1127 (November 27, 1972), at p. 8. *Cf. Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring), and *Skinner v. Oklahoma*, 316 U.S. 535, 542-43 (1942).

<sup>6</sup> 28 U.S.C. § 2201 (1970):

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any

judgments "with respect to Federal taxes," and 26 U.S.C. § 7421(a) (1970),<sup>7</sup> which prohibits suits "for the purpose of restraining the assessment or collection of any tax." The trial court denied appellants' petition to convene a three-judge court, finding that no substantial constitutional question was raised, and granted appellee's motion to dismiss, citing *National Council on the Facts of Overpopulation v. Caplin*, 224 F.Supp. 313 (D.D.C. 1963).

Alleging error in both aspects of the trial court's order, appellants bring this appeal. Contending that no taxes have been assessed or collected, that this is a civil rights rather than tax case, and that they have no other adequate remedy, appellants maintain that the provisions of 26 U.S.C. § 7421(a) (1970) and 28 U.S.C. § 2201 (1970) cannot be used to prohibit the declaratory and injunctive relief sought. They further contend that they have raised substantial constitutional questions meriting the invoking of a three-judge court under the standards established in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962). Appellee's posture on appeal is somewhat different, of course, and in addition to the grounds listed by the trial judge for dismissing the action he relies upon the doctrine of governmental immunity, claiming this to be an unconsented suit against the United States. *Louisiana v. McAdoo*, 234 U.S. 627 (1914).

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such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

<sup>7</sup> 26 U.S.C. § 7421(a) (1970):

Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The exceptions provided are not applicable to this case.

## II. JURISDICTION

### 1. Introduction

The statutes providing for three-judge "constitutional" courts, adopted to avoid impolitic action on the part of lone federal district judges in matters of broad regulatory scope, are procedural rather than substantively jurisdictional in nature. A complaint which raises substantial constitutional questions and otherwise meets the requirements of § 2282 can and should be dismissed if independent district court jurisdiction is found wanting. "[T]he provision requiring the presence of a court of three judges necessarily assumes that the District court has jurisdiction." *Ex Parte Poresky*, 290 U.S. 30, 31 (1933). This court has held that a dismissal for want of jurisdiction is properly a matter for a single district judge without considering the question of convening a three-judge court. *Eastern States Petroleum Corp. v. Rogers*, 280 F.2d 611 (D.C. Cir. 1960), cert. denied, 364 U.S. 891 (1960). Accord, *National Council on the Facts of Overpopulation v. Caplin*, 224 F. Supp. 313 (D.D.C. 1963). The first order of business for the single district judge is simply put (although, as here, not so simply decided): Does the district court have jurisdiction even to consider the applicability of a three-judge panel, or are the plaintiffs out of court for lack of subject matter jurisdiction?

The anti-injunction statute (26 U.S.C. § 7421 (1970)) by its terms denies jurisdiction to "any court" in actions seeking to enjoin the assessment or collection of taxes. If such a statute is applicable here the appellants cannot be afforded the relief requested, regardless of the substantiality of the constitutional questions raised. See, e.g., *Harvey v. Early*, 160 F.2d 836 (4th Cir. 1947).

Although its legislative history may be "shrouded in

darkness,"\* the *raison d'être* of § 7421(a) was illuminated by Chief Justice Warren in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962):

The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. *In this manner the United States is assured of prompt collection of its lawful revenue.* (Emphasis added, footnote omitted.)

See also *State Railroad Tax Cases*, 92 U.S. 575, 613-14 (1875). Section 7421(a) was thus born of administrative and governmental necessity, used to prevent intermeddling in the tax collection process. An offspring of the equity rule that a suit to enjoin the collection of taxes was not maintainable unless an adequate remedy at law was lacking, its language is much stronger and more encompassing in scope. Even if it can be shown that irreparable injury will result if the collection is effected, § 7421(a) bars a suit for an injunction in the absence of very special circumstances. See *Enochs, supra*, 370 U.S. at 6.

The history of the Declaratory Judgments Act and § 2201 is somewhat different. When initially promulgated in 1934,<sup>9</sup> the phrase "except with respect to federal taxes" was absent from § 2201. Consequently, federal taxpayers (innovative as they are) quickly utilized it to obtain declaratory judgments holding various tax statutes unconstitutional, something they were barred from accomplishing under the anti-injunction statute.<sup>10</sup> Congress (innovative

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\* See Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 HARV. L. REV. 109 (1935)

<sup>9</sup> Act of June 14, 1934, ch. 512, 48 Stat. 955.

<sup>10</sup> See, e.g., *Penn v. Glenn*, 10 F.Supp. 483 (W.D. Ky. 1935),



as it is) quickly reacted and amended § 2201 to include the contentious phrase.<sup>11</sup> The Senate Finance Committee, in reporting out the amended version, stated that the "application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress [as represented today by § 7421(a)] with respect to the determination, assessment, and collection of Federal taxes."<sup>12</sup> Literally broader than § 7421(a) in its preclusion of tax oriented remedies, the §2201 exception has literally been found coterminus with that provided by § 7421(a). *McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C. 1972). See also *Bullock v. Latham*, 306 F.2d 45 (2d Cir. 1962), and *Tomlinson v. Smith*, 128 F.2d 808 (7th Cir. 1942). We believe that to be a correct interpretation, one soundly based on the history of the exception and on the paradoxicalness of authorizing injunctive relief while depriving courts the authority to declare the rights of the parties in connection with the injunctive relief. The breadth of the tax exception of § 2201 is co-extensive with the effect of § 7421(a), and so the applicability of the latter to our situation is determinative of jurisdiction.

## 2. Individual Appellants

The springboard of the action before us—namely that

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*app. dismissed per curiam*, 84 F.2d 1001 (6th Cir. 1936), and *F.G. Vogt & Sons, Inc. v. Rothensies*, 11 F.Supp. 225 (E.D. Pa. 1935). Although both courts refused to grant injunctive relief, they expected the tax collector to "respect the decision." If he did not do so and the taxpayer was forced to sue for a refund, "the trial court would probably be justified in refusing him a certificate of probable cause, and thus he and his bond would be liable for the judgment obtained." 11 F.Supp. at 231. This was a neat circumvention of the anti-injunction statute, but one that Congress did not appreciate.

<sup>11</sup> Act of August 30, 1935, ch. 829, § 405, 49 Stat. 1027.

<sup>12</sup> S. REP. NO. 1240, 74th Cong., 1st Sess. 11 (1935).

the removal of Americans United from the status of those corporations to whom tax deductible contributions can be made has wreaked havoc upon its financial stature—is the same for both the individual and corporate appellants. They seek to keep Americans United afloat. However, the posture of the appellants and the effect that the relief sought would have upon them is distinctively different. Stripped to its barest essentials, the individual appellants' relief relates directly to the assessment and collection of taxes. They seek, despite their averments that no taxes have been assessed and that this is a civil rights rather than tax case, to enjoin the appellee from assessing or collecting taxes on those dollars contributed by them to Americans United. In paragraph 3 of the relief portion of appellants' amended complaint this becomes evident:

[Plaintiffs pray that the following relief be granted:] Judgment enjoining defendant Thrower from enforcing Sections 170(c) and 501(c)(3) of Title 26 U.S.C.A., so as to deprive the individual plaintiffs and others similarly situated of the benefit of tax advantages in the exercise of their First Amendment rights by reason of the unconstitutionality of those sections.

The allegations that the tax will be assessed and collected in violation of their constitutional rights is to no avail. See *Dodge v. Osborn*, 240 U.S. 118 (1916); *Harvey v. Early*, 160 F.2d 836 (4th Cir. 1947); *Moon v. Freeman*, 245 F.Supp. 837 (E.D. Wash. 1965); *National Council on the Facts of Overpopulation v. Caplin*, 224 F.Supp. 313 (D.D.C. 1963). The allegation that no tax has as yet been assessed, and that therefore the action is somehow without § 7421(a), we find to be equally without merit. In the words of Chief Judge Sirica in *National Council*, *supra*, 224 F.Supp. at 314, "[t]he Court cannot agree that the immunity of a tax assessment from court-imposed restraint has anything to do with the timing of that restraint." Finally, the individual appellants have not shown the high probability of success on the merits that warrants the non-application of



§ 7421(a) under the standards enunciated in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962):

[I]f it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the *Nut Margarine* case, [*Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932)], the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in "the guise of a tax." *Id.*, at 509.

We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim may the suit for an injunction be maintained.

The action brought and the relief sought by the individual appellants directly ranges within the ambit of § 7421(a), and as to them the action of the district court in dismissing the case was correct.

### 3. Corporate Appellant

Americans United, at the present time exempt from taxation on income by virtue of 26 U.S.C. § 501(c)(4) (1970), does not seek in this lawsuit to enjoin the assessment or collection of its own taxes. Because of the "tax breaks" attendant to contributions to corporations qualifying under § 170(c) of the Code, qualification thereunder is a precious possession and removal from the *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954* is a damaging—sometimes fatal—injury to the financial status of any "charitable" organization. Potential contributors with a minimum of business acumen are careful to get the most for their contributed dollar, and one certain way not to do so is to contribute to non-§ 170 corporations. Appellant, therefore, presented with the dollar di-

lemma of finding prospective contributors closing their wallets, seeks to have the court restrain the Commissioner from meting § 501(c)(3) and § 170(c) qualifications in the alleged unconstitutional manner. A necessary side effect of any relief, of course, will be to allow contributions which otherwise would be made with after tax dollars to become deductible. Consequently, the appellee alleges that this is in essence a suit to restrain the assessment or collection of a tax and barred by § 7421(a).

*McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C. 1972), involved a class action brought by a black American denied membership in an Elks Lodge because of his race. The plaintiff sought to enjoin the Secretary of Treasury from granting tax benefits to fraternal and nonprofit organizations which excluded nonwhites from membership. The statutes involved were similar to those in the case before us, granting various exemptions both to the organizations and their contributors. The plaintiff alleged that the statutes were either unconstitutional, unconstitutionally interpreted, or that the benefits granted thereby were in violation of Title VI of the Civil Rights Act of 1964. The defendant moved to dismiss citing §§ 2201 and 7421(a), but a three-judge district court denied the motion. Chief Judge Bazelon, writing for the court, stated:

Plaintiff's action has nothing to do with the collection or assessment of taxes. He does not contest the amount of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States. The preferred course of raising his objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit. To hold otherwise would require the kind of ritualistic construction which the Supreme Court has repeatedly rejected. Even where the particular plaintiff objects to his own taxes, the Court has recognized that the literal terms of the statute do not apply when "the central purpose of the Act is inapplicable." In the present case, the central purpose is clearly inapplica-

ble. It follows that neither § 7421(a) nor the exception to the Declaratory Judgment Act prohibits this suit. *Id.* at 453-54 (footnotes omitted).

A case from the opposite side of the restraint coin, wherein the Commissioner threatened to remove the tax exempt status of an organization because of racially discriminatory policies, is *Bob Jones University v. Connally*, 341 F.Supp. 277 (D.S.C. 1971). Fearing that a drop in its level of contributions would cause irreparable harm, the University sought a preliminary injunction restraining the Commissioner from removing its § 501(c)(3) qualification. Faced with identical §§ 2201 and 7421(a) arguments, the district judge granted the injunction. The court found that the gravamen of the plaintiff's complaint was not to ask the court to substitute its views for that of the Commissioner, *see Jolles Foundation, Inc. v. Moysey*, 250 F.2d 166 (2d Cir. 1957), but rather to prevent the Commissioner from acting "beyond the authority granted by the constitution or by the Congress, and to read into the Internal Revenue Laws powers that are not expressly given and that were never intended by Congress." 341 F.Supp. at 282-83. The court went on to state:

If there were no contest as to the legality or the power of the defendants to revoke under existing law plaintiff's tax exempt status because of its admitted racial discriminatory admissions policy, but was instead a case involving the applicability of such a rule to the plaintiff, it would then appear to be a case where this court was asked to preempt discretionary power of a federal office which it would be powerless to do. . . . Plaintiff is not challenging the applicability of the rule, but the legality of the rule itself.

Bob Jones University is not seeking a declaratory judgment, but rather seeks to enjoin the defendants from exercising alleged illegal and *ultra vires* power and authority. Consequently, it is concluded that the levy, assessment, and collection of a tax is not the main issue. Plaintiff does not contest the amount or

method of any levy, assessment, or collection, or evidence to be used in making such determination of taxes that might become due. Plaintiff is seeking to enjoin what it contends to be illegal and unconstitutional actions or threatened actions on the part of officials of the United States Government which it claims would lead to irreparable harm . . . .

*Id.* at 283.

Here, as in *Bob Jones*, the essence of appellants' attack is not against the applicability of a test or their ability to qualify under presently existing standards. As the appellee correctly points out in his brief, "[appellants] do not seriously contend that Americans United qualifies under Section 501(c)(3) as written. Rather, they contend that the clause disqualifying organizations which devote a substantial part of their activities to political propaganda and lobbying should be elided as unconstitutional, and they seek a declaratory judgment to that effect."

Appellee principally relies upon *Jolles Foundation, Inc. v. Moysey*, *supra*. Although there is language in *Jolles* regarding § 2201 we believe it to be distinguishable and not persuasive. In *Jolles* the appellant alleged that the Commissioner erred in his determination of its tax exempt qualification, and brought an action which the court correctly viewed as in the nature of mandamus "against the Commissioner to compel him to reverse his position based upon the activities of the Foundation already held not to come within the exemption . . ." 250 F.2d at 169. We submit that the *Jolles* case did not involve the alleged unconstitutionality of a taxing statute, but a challenge respecting the judgment of the Commissioner, and manifestly "the court cannot presume to speak for the Commissioner or take over his duty to pass upon the tax status of organizations applying for exemption." *Id.*

Here, as in *McGlotten* and *Bob Jones*, no tax has been or will be assessed against the corporate appellant. The

restraint upon assessment and collection is at best a collateral effect of the action, the primary design not being to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation. The corporation, alleging constitutional violations of an identical nature to that of the individual appellants, irreparable injury, and an inadequate legal remedy,<sup>13</sup> does so in a posture removed from a restraint on assessment or collection. We find, as did the courts in *Bob Jones*, *McGlotten*, and impliedly the court in *Green v. Kennedy*, 309 F.Supp. 1127 (D.D.C. 1970), on permanent injunction, 330 F.Supp. 1150 (D.D.C. 1971), *aff'd per curiam*, 404 U.S. 997 (1971),<sup>14</sup> that it would be an

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<sup>13</sup> Since Americans United qualifies as a tax exempt organization pursuant to § 501(c) (4) of the Code, the normal avenue of challenge, tax refund litigation, is not available. Appellee in his Supplemental Memorandum and at oral presentation has for the first time suggested two additional "adequate" legal remedies available to the appellant corporation. These are the federal social security and unemployment tax refund litigations, since § 501(c) (3) organizations are exempt from both taxes while § 501(c) (4) organizations are exempt from neither.

Appellant points out that although not required to pay social security taxes while exempt under § 501(c) (3), it elected to do so. A termination of such an election requires two years advance notice and cannot be made if the election has been in effect more than eight years, as it was here. Moreover, under 26 U.S.C. § 3121(k) (3) (1970), an organization which once terminates its election to pay those taxes voluntarily cannot renew the election. Although the unemployment tax refund litigation is not fraught with perils of equal magnitude, it is subject to certain conditions and, we feel, is so far removed from the mainstream of the action and relief sought as to hardly be considered adequate.

<sup>14</sup> *Green* involved a class action brought by black students and their parents to enjoin the Secretary of Treasury from granting tax exempt status to private schools discriminating

all too encompassing interpretation of § 7421(a) to consider it as precluding a suit of this nature, and refuse to so hold.<sup>15</sup>

We do not adopt the doctrine that § 7421(a) is inapplicable so long as a party does not seek to restrain the collection or assessment of its own taxes. Our holding is much narrower. In those situations where a non-taxpayer sues in the stead of the taxpayer,<sup>16</sup> *e.g.*, the shareholder suits

against blacks. A three-judge district court was convened and, Judge Leventhal writing, determined that the Internal Revenue Code could not be interpreted as granting a tax exempt status to such organizations. Although faced with governmental insistence that the relief sought was barred by §§ 2201 and 7421(a), the court did not address the problem but granted the injunctive relief. The case was affirmed *per curiam* and without opinion by the Supreme Court, but as by that time the Commissioner had "voluntarily" altered the rules to comply with the decision, and the government did not press the appeal, the precise force and effect of the affirmation is questionable.

<sup>15</sup> The ultimate effect of the *Green* and *McGlotten* litigations was to increase the tax revenue of the United States, while at least theoretically the effect of *Bob Jones* and the case at hand is to decrease the tax revenue. We do not believe, and appellee has in fact agreed, that such a fact is of distinguishable merit. It is untenable that a party seeking to have an entire section declared unconstitutional, thus removing the exemption and theoretically increasing the tax revenue, should be treated differently from one seeking to remedy the discriminatory underinclusion by striking the unconstitutional clause, and thus theoretically decreasing the tax revenue.

In reaching our conclusion regarding the applicability of § 7421(a) we have considered, and found unpersuasive, the decisions in *Liberty Amendment Committee of the U.S.A. v. United States*, Civ. No. 70-721-HP (C.D. Cal. June 19, 1970), *aff'd per curiam*, No. 26,507 (9th Cir. July 7, 1972), and *Crenshaw County Private School Foundation v. Connally*, 343 F.Supp. 495 (M.D. Ala. 1972).

<sup>16</sup> Arguably *Americans United's* purpose could be that of



brought on behalf of a reluctant corporation, *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U.S. 455, 464 (1903), *cf.*, *Helvering v. Davis*, 301 U.S. 619, 639-40 (1937), or where the tax itself directly operates to place a financial burden upon the taxpayer, *e.g.*, where the valuation of an estate for estate tax purposes would affect the tax liability of a non-taxpayer at a future date, *West Chester Feed & Supply Co. v. Erwin*, 438 F.2d 929 (6th Cir. 1971), when a tax levied upon processing oil would directly affect one about to enter the processing business, *Gardner v. Helvering*, 88 F.2d 746 (D.C. Cir. 1936), *cert denied*, 301 U.S. 684 (1937), *au fond* it is a suit to restrain the collection or assessment of a tax "indirectly" levied upon the plaintiff, and within the purpose and proscription of § 7421(a):

What we have then is a hybrid sort of fellow. The challenge upon which we reverse runs not to the exercise of discretion or the everyday working affairs of the Commission, something we feel history and good sense implore us to leave alone, nor is it concerned with taxes levied either directly or "indirectly" upon the corporate appellant, something which § 7421(a) mandates us to leave alone.<sup>17</sup> Finally, an alternate legal remedy in the form of adequate refund

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"representing" its remaining contributors who now face the assessment of taxes on their contributed dollars—a sort of "end run" maneuver to avoid the proscriptions of § 7421(a) that we have found to apply to suits brought by those contributors—but we do not believe such to be a realistic appraisal of the situation. Americans United is concerned about its own preservation which is threatened not by the indirect burden of the tax upon them, but by the "unconstitutional" action of the Commissioner resulting in the driving of prospective contributors to other "charities."

<sup>17</sup> Standing to sue and ripeness problems, neither of which we find to preclude the lawsuit before us, could also work to prevent other litigation which arguably would be without the scope of §§ 2201 and 7421(a).

litigation is unavailable. The lack of a meaningful alternate form of relief is important herein for two reasons: first, its absence solidifies our belief that the situation *sub judice* is without the purpose and expected scope of § 7421(a), and second, its absence renders equitable relief most appropriate. We suspect that the birthrate of such a hybrid will be so low that the proverbial "flood gates" to judicial review of Internal Revenue Service action will remain closed.

#### 4. *Sovereign Immunity*

Appellee, relying chiefly upon *Louisiana v. McAdoo*, 234 U.S. 627 (1914), urges the court to recognize this suit as one against the United States to which consent has not been given, and hence barred by the doctrine of sovereign immunity. We feel that the appellee has failed to recognize this suit as rightly falling within the exceptions to the doctrine as reiterated by the Supreme Court in *Dugan v. Rank*, 372 U.S. 609, 622 (1963). Those exceptions relate to (1) actions by officers beyond their statutory powers, and (2) actions within the scope of their authority, when the powers themselves or the manner in which they are exercised are constitutionally void. The appellants do not challenge the right of the Commissioner to adopt rules and regulations, but they do challenge his right to enforce a statute which they assert violates various constitutional liberties. This clearly falls within the "exception" almost as broad as the "rule," that "sovereign immunity does not prevent a suit against a state or federal officer who is acting either beyond his authority or in violation of the Constitution."<sup>18</sup>

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<sup>18</sup> K. Davis, *ADMINISTRATIVE LAW TREATISE* 522 (1958). Professor Davis treats *Ex Parte Young*, 209 U.S. 123 (1908) as the "foundation case" for such a rule:

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or repre-



### III. SUBSTANTIAL CONSTITUTIONAL QUESTION

The single district court judge below denied appellants' motion to convene a three-judge panel pursuant to 28 U.S.C. § 2282 (1970), for the stated reason that the challenge raised no substantial constitutional questions. We reverse and remand with respect to the only remaining appellant in this litigation, Americans United, with instructions to promptly convene a § 2282 panel.

In *Bulluck v. Washington*, No. 24,862 (D.C. Cir. Jan. 19, 1972), rehearing *en banc*, May 31, 1972, we have recently had an opportunity to restate the scope of a district court's inquiry (and consequently our scope of review) when confronted with an application for a § 2282 panel. The court is limited to questioning (1) whether the constitutional questions raised are substantial, which in turn is limited to a determination of whether they are "obviously without merit" or so clearly unsound by reason of previous decisions of the Supreme Court "as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky*, 290 U.S. 30, 32 (1933); (2) whether the complaint at least formally alleges a basis for equitable relief; and (3) whether the case presented otherwise comes within the requirements of the three-judge panel. *Idlewild Bon Voyage Corp. v. Epstein*, 370 U.S. 713, 715 (1962).

As our discussion of the case to this point has shown, what appellant effectively seeks here is a restraint on the enforcement of the "substantial part" clause of § 501(c)(3). It accomplishes this by seeking a declaratory judgment that the section is unconstitutional, and by requesting injunctive

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sentative character and is subjected in his person to the consequences of his individual conduct.

*Id.* at 159-160. See also *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304-05 (1952).

relief to force the Commissioner to reclassify it and other similarly situated corporations as tax exempt if they are found to qualify. This type of action, affecting legislation of broad regulatory scope and amounting to a restraint on its enforcement as written and interpreted, is within the § 2282 mandate. Satisfied that the other requirements for the three-judge panel are present, and that equitable relief is properly requested, we turn to the substantiality question.

Although as can be seen from our earlier listing<sup>19</sup> appellants originally raised a multitude of possible constitutional violations, at oral argument and in its Reply Brief it has narrowed its focus, and we believe wisely so, to the "discriminatory" aspects of § 501(c)(3). Basically, this is that since larger, wealthier organizations can engage in conduct identical to that of appellant without, because of their size, falling within the "substantial part" category of § 501(c)(3) and thereby losing their precious tax exempt status (and more precious listing among those corporations to whom tax free contributions can be made); § 501(c)(3) is unconstitutionally discriminatory in violation of the equal protection ramifications of the due process clause of the fifth amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).<sup>20</sup> We find such a claim, novel as it may be, neither

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<sup>19</sup> See pp. 4-5, *supra*.

<sup>20</sup> It is true that in *Helvering v. Lerner Stores Co.*, 314 U.S. 463, 468 (1941), Justice Douglas wrote that "[a] claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause." The great weight of authority today, however, as exemplified by *Bolling*, *Schneider v. Rusk*, 377 U.S. 163 (1964), and *Shapiro v. Thompson*, 394 U.S. 618 (1969), is that "[w]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" 377 U.S. at 168.

obviously without merit nor foreclosed by previous Supreme Court decisions.

Appellee relies chiefly upon *Cammarano v United States*, 358 U.S. 498 (1959), but *Cammarano*, while disposing of appellants' claim that first amendment rights are violated by the questioned statute, does not attempt to deal with possible discriminatory conduct. In *Cammarano* liquor dealers had expended funds in advertising campaigns against statutory resolutions in Washington and Arkansas which would have effectively closed their businesses, and sought to deduct their costs as ordinary business expenses. The lower courts ruled that "the payments . . . were 'expended for . . . the . . . defeat of legislation' within the meaning of Treas. Reg. 111, § 29.23(0)-1 and were therefore not deductible as ordinary and necessary business expenses under § 23(a)(1)(A) of the Internal Revenue Code of 1939." *Id.* at 501. The court, per Chief Justice Warren, continued:

Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "aimed at the suppression of dangerous ideas."

*Id.* at 513. Americans United, on the other hand, alleges just that discriminatory conduct found lacking in *Cammarano*. This discrimination relates solely to the "size" of the organization, which appellants allege is directly related to its wealth and power structure, and comes into play during and because of the exercise of first amendment protected liberties. By allowing larger, richer organizations more "dollar punch" in terms of "propagandizing" and "influencing legislation" before their respective activities

are considered "substantial," the Commissioner is accused of following the mandate of § 501(c)(3) and treating identical activity differently, solely on the basis of the size, or wealth, of the acting party.

Nearly every jurist and attorney today is aware of the flood of cases before the bench raising important questions, at least in the context of the fourteenth amendment equal protection clause, concerning the interpretation of "fundamental rights," "suspect categories," and their resultant "compelling state interest test." A case similar to the redoubtable *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), which struck down California's system of public school financing as violative of the fourteenth amendment, and straightforwardly classified both "wealth" and "education" as categories calling for stricter justification in terms of equal protection, is presently submitted before the United States Supreme Court. *San Antonio Independent School District v. Rodriguez*, No. 71-1332 (argued 10/12/71, 41 U.S.L.W. 3197). The Court's decision in that case should prove most instructive in an area of concern before us—"discrimination" of this type as within the "wealth" category, and the status of "wealth" as giving rise to the compelling interest test.

If discrimination exists here it relates to the exercise of the most fundamental of rights, those protected by the first amendment,<sup>21</sup> and raises questions concerning the directness

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<sup>21</sup> See dissent of Marshall, J., in *California v. LaRue*, 41 U.S.L.W. 4039, 4048 (December 5, 1972), for discussion of classifications based on speech. See also *Speiser v. Randall*, 357 U.S. 513 (1958), a case which although decided on procedural due process grounds discussed the effect of tax exemptions:

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the

of its relationship to wealth. We are aware that the various tests of which we speak have arisen in the context of the fourteenth amendment, but find that they are nonetheless relevant to the consideration of whether the government has exercised its taxing powers in such a discriminatory fashion as to violate the due process guaranties of the fifth amendment. This is neither a frivolous challenge nor one which, as of the writing of this opinion, has been foreclosed by the Supreme Court.

We want to stress that our opinion is in no way meant to state our views of the merits of this case beyond that required: namely, that the possibility of success is not so certain as to merit the *Enochs* exception with respect to § 7421(a), yet not so frivolous or foreclosed as to merit denial of the § 2282 motion. The discrimination problem may ultimately prove to be a mirage, or even a muddle, but it certainly is not maggot-pated. The question merits a three-judge panel.

*Reversed and remanded for further proceedings consistent with this opinion.*

**WILKEY, Circuit Judge, concurring:** I concur unreservedly in Judge Tamm's opinion for the court, all the more willingly because his opinion is a model of lucidity in a field of law—taxation—in which that quality is as rarely found in either judicial decisions or legislation as sunlight on the dark side of the moon.

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State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

*Id.* at 518.

Since we have decided no issue on the merits, except that the constitutional issues are sufficiently serious to require decision by a three-judge court, I believe it appropriate to raise a question for the consideration of the three-judge court which was not briefed by the parties and is not dealt with by our court's opinion.

As I see it, the basis of our decision here is that there is a substantial constitutional question because the challenged tax provision discriminates on the basis of wealth (size), and because the Supreme Court is currently considering cases which may say that such distinctions need to be closely analyzed. Although other statutes are relevant, the vital statute at issue is 26 U.S.C. § 501(c)(3) (1970), quoted in footnote one of the court's opinion. Making a careful analysis of this statute, the first part states why tax exemption is granted—and that relates to the *purpose* of the organization. Thereafter are listed several factors which will nullify the tax-exempt status granted by the first part of § 501(c)(3). One of the *disqualifications* for tax-exempt status is expressed in the phrase, "... no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, . . ."

And this disqualification phrase is what this case is all about. 26 U.S.C. § 501(c)(3) *first* ties tax status to the *purpose* of the organization—and the "no substantial . . . influence legislation" disqualification test (like the disqualification reference to private earnings or political campaigns) *is aimed at assuring some purity in that purpose*.

It is arguable that a small organization that spends almost all of its funds lobbying is not organized or conducted for the same purpose as a large organization, which may spend quantitatively as much, but which proportionately devotes most of its activities to unquestionably exempt purposes. If we make an analysis by following the

impact of the donor's dollar, a gift to "Americans United" has "more punch" on the legislative front than a gift to a large church organization which spends only 1% of its income on lobbying activities.

In that sense, the large organization is not engaged in what can reasonably be called "identical conduct." The statute does not give any greater privilege of speech to large organizations—other than the greater amount of impact any group can have if it raises more money. Rather, the interpretation of equal protection sought by "Americans United" would give a greater right of speech—by emasculating the "purpose" rationale of § 501(c)(3)—to small organizations. We cannot ignore the "purpose" rationale, because *purpose* is the *only* ground for tax exemption under § 501(c)(3).

Furthermore, if the larger groups are seen as engaged in "identical conduct"—what is to be the bench mark? If the purpose of the tax statute is to be preserved at all, then the large church organizations probably must hold to devoting a small percentage of their resources to lobbying. Is that *quantitative* amount then to guide—so that a small organization, with total funds amounting only to the tiny percentage which the large organization devotes to this purpose, could devote 100% of its funds to lobbying and still be exempt?

In short, it is certainly arguable that small groups are not being treated differently by § 501(c)(3) because they are small, but because they are obviously operating for a different purpose if they devote their comparatively small funds on a much different proportionate basis to propaganda for legislation.

I have raised the issue above by stating only one side of the argument. There are, of course, counterarguments.<sup>1</sup>

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<sup>1</sup> Some counterarguments may be derived from William G.

We are not here deciding this or any other issue on the merits, but since neither party has seen fit to bring this issue to the courts' attention, I feel it of sufficient importance to raise it for such consideration as the three-judge court and parties may wish to give it.

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Halby's article, "Is the Income Tax Unconstitutionally Discriminatory?"; 58 A.B.A.J. 1291 (December, 1972). Others may be inspired by the reflection that, if 200 years ago men revolted on the principle that "Taxation without representation is tyranny", then today men may rise in righteous wrath because taxation with representation but beyond human comprehension is even worse.



APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SEPTEMBER TERM, 1972

Civil Action 2269-70

No. 71-1299

[Filed Jan. 11, 1973, United States Court of Appeals  
for the District of Columbia Circuit,  
Hugh E. Kline, Clerk]

"AMERICANS UNITED" INC., ET AL., APPELLANTS

v.

JOHNNIE M. WALTERS,  
Commissioner of Internal Revenue

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Before: Fahy, Senior Circuit Judge, Tamm and  
Wilkey, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and this case is hereby remanded to the

District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam  
For the Court

/s/ Hugh E. Kline  
HUGH E. KLINE  
Clerk

Opinion by Circuit Judge Tamm.  
Concurring opinion by Circuit Judge Wilkey  
Dated: January 11, 1973

## APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS  
AND GIFTS.

\* \* \* \*

(c) [as amended by Sec. 201(a), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] *Charitable Contribution Defined*.—For purposes of this section, the term “charitable contribution” means a contribution or gift to or for the use of—

\* \* \* \*

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (includ-

ing the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

\* \* \*

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

\* \* \*

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

\* \* \*

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

\* \* \* \*

SEC. 3301 [as amended by Sec. 301(a), Employment Security Amendments of 1970, P.L. 91-373, 84 Stat. 695]. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306 (a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306 (b)) paid by him during the calendar year with respect to employment (as defined in section 3306 (c)).

SEC. 3306. DEFINITIONS.

\* \* \* \*

(c) [as amended by Sec. 105(a), Social Security Amendments of 1970, *supra*] *Employment*.—For purposes of this chapter, the term “employment” means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever

nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, \* \* \* except—

\* \* \* \*

(8) [as amended by Sec. 533, Social Security Amendments of 1960, P.L. 86-778, 74 Stat. 924] service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

**SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.**

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] *Tax*.—Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

\* \* \* \*

## 28 U.S.C.:

§ 2201 [as amended by Sec. 111, Act of May 24, 1949, c. 139, 63 Stat. 89]. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. *Further relief.*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

APPENDIX E

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-721-HP

[Filed Jun. 19, 1970]

LIBERTY AMENDMENT COMMITTEE OF THE U. S. A.,  
a California corporation, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

ORDER GRANTING MOTION TO DISMISS

On April 24, 1970, defendants filed their motion to dismiss plaintiff's complaint for a writ of mandate. The matter came on for hearing on June 15, 1970. Pursuant to Rule 3(d) of the Local Rules, the motion was submitted for the Court's decision following oral argument.

Plaintiff is a non-profit corporation whose purpose is to promote the adoption of a constitutional amendment which would, inter alia, repeal the federal income, estate, and gift taxes. Currently tax exempt under 26 U.S.C. § 501(c)(4), plaintiff seeks a mandatory injunction ordering defendants to eliminate from the Treasury Regulations under § 501(c)(3) all language indicating that the term "legislation" includes action involving a constitutional amendment and ordering defendants to grant plaintiff tax exempt status under § 501(c)(3).

26 U.S.C. § 501(c)(3) provides tax exempt status for religious, charitable, scientific, literary, or educational organizations but excludes from such



status organizations which, as a substantial part of their activities, engage in attempts "to influence legislation." Treas. Reg. § 1. 501 (c) (3)-1 (c) (3) provides that "legislation" includes action by the Congress or any state legislature involving a constitutional amendment. Since plaintiff's activity is concerned with securing the adoption of a constitutional amendment, the I.R.S. had denied plaintiff tax exempt status under § 501(c) (3).

Defendants have moved to dismiss the complaint on the grounds that the Court lacks jurisdiction over the subject matter and the complaint fails to state a claim upon which relief can be granted.

As a basis for the Court's jurisdiction over this action, plaintiff cites 28 U.S.C. §§ 1346 and 1361. Section 1346, the Tucker Act, does not authorize suits where only declaratory or other equitable relief is sought; rather, it applies only to suits for recovery of money damages. *Wells v. U. S.*, 280 F. 2d 275 (9th Cir. 1960). Since plaintiff's suit seeks a mandatory injunction and, in effect, a declaratory judgment, § 1346 (a) (2), the subsection invoked by plaintiff, is not applicable.<sup>1</sup>

Section 1361, upon which plaintiff apparently places primary reliance, grants the district court jurisdiction over any action in the nature of mandamus to compel an officer or employee of the United States or any United States Agency to perform a duty owed to plaintiff. In the present case, plaintiff contends that the I.R.S. has a duty to grant plaintiff tax exempt status.

Despite plaintiff's contention, no duty is owed to plaintiff [3] unless the Treasury Regulations under § 501(c) (3) are incorrect interpretations of the act. In the context of this case, where plaintiff is neither

seeking a refund of taxes nor defending against a tax collection suit by the government, a determination that the Regulations are invalid could only be by means of a declaratory judgment. However, 28 U.S.C. § 2201, the Declaratory Judgment Act, specifically excludes from its purview any case with respect to federal taxes. Since federal tax controversies are expressly excluded from the statute, the Court has no jurisdiction to make the determination which plaintiff requests. See *Mitchell v. Riddell*, 402 F. 2d 842 (9th Cir. 1968); *Jolles Foundation v. Moysey*, 250 F. 2d 166 (2d Cir. 1957).

In view of the above, the Court concludes that plaintiff's suit is premature and the relief requested falls outside the Court's jurisdiction. Hence, defendants' motion will be granted.

Because of the Court's ruling granting the motion to dismiss, it is unnecessary to consider the merits of plaintiff's claim for tax exemption. Nevertheless, a few comments on plaintiff's argument are appropriate.

Plaintiff contends that the term "legislation" should be strictly interpreted to include only statutory law. Plaintiff cites numerous cases for the proposition that legislation is distinct from constitutional amendment. Since it is concerned only with amending the Constitution, plaintiff argues that the excluding language of § 501(c) (3) is not applicable.

When viewed in the light of the manifest purpose of the exclusion in § 501(c) (3), plaintiff's argument is not very persuasive. Broadly read, the term "legislation" would comprehend law of both statutory and constitutional nature. This broad construction would better serve the Congressional [4] purpose in denying tax exemption to organizations "carrying on

propaganda, or otherwise attempting, to influence legislation". In denying tax exemption to such organizations the intent of Congress was to deny tax subsidies to lobbyists, or, put another way, to deny special benefits through tax exemption to organizations seeking to secure their objectives through the enactment of law. There is little difference involved in lobbying activity designed to promote the passage of statutory law and lobbying activity aimed at the adoption of constitutional law.

Similarly, to an organization seeking to codify its economic objectives or philosophical goals, the ratification of a constitutional amendment is certainly no less palatable than the passage of a statute. If Congress intended to deny tax exemption to an organization whose efforts were directed toward the latter, it cannot be doubted that like treatment was intended for organizations actively seeking the former.

IT IS ORDERED that defendants' motion to dismiss is granted and the complaint and action are hereby dismissed.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order, by United States mail, upon the attorneys of record for the parties appearing in this cause.

Dated: June 19, 1970.

/s/

HARRY PREGERSON

United States District Judge

[5]

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<sup>1</sup> Plaintiff denies that it is seeking declaratory relief; nevertheless, a declaration that plaintiff is entitled to tax exempt status would be prerequisite to the issuance of a mandatory injunction. Cf. *In Re Inland Gas Corp.*, 241 F. 2d 374, 378 (6th Cir. 1957).

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 26,507

LIBERTY AMENDMENT COMMITTEE OF THE U.S.A.,  
a California corporation, PLAINTIFF-APPELLANT

*v.*

UNITED STATES OF AMERICA, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, RANDOLPH W. THROWER (now JOHNNIE M. WALTERS), Commissioner of Internal Revenue of the United States; FRANK S. SCHMIDT, District Director of United States Internal Revenue Service, Los Angeles, California, DEFENDANTS-APPELLEES

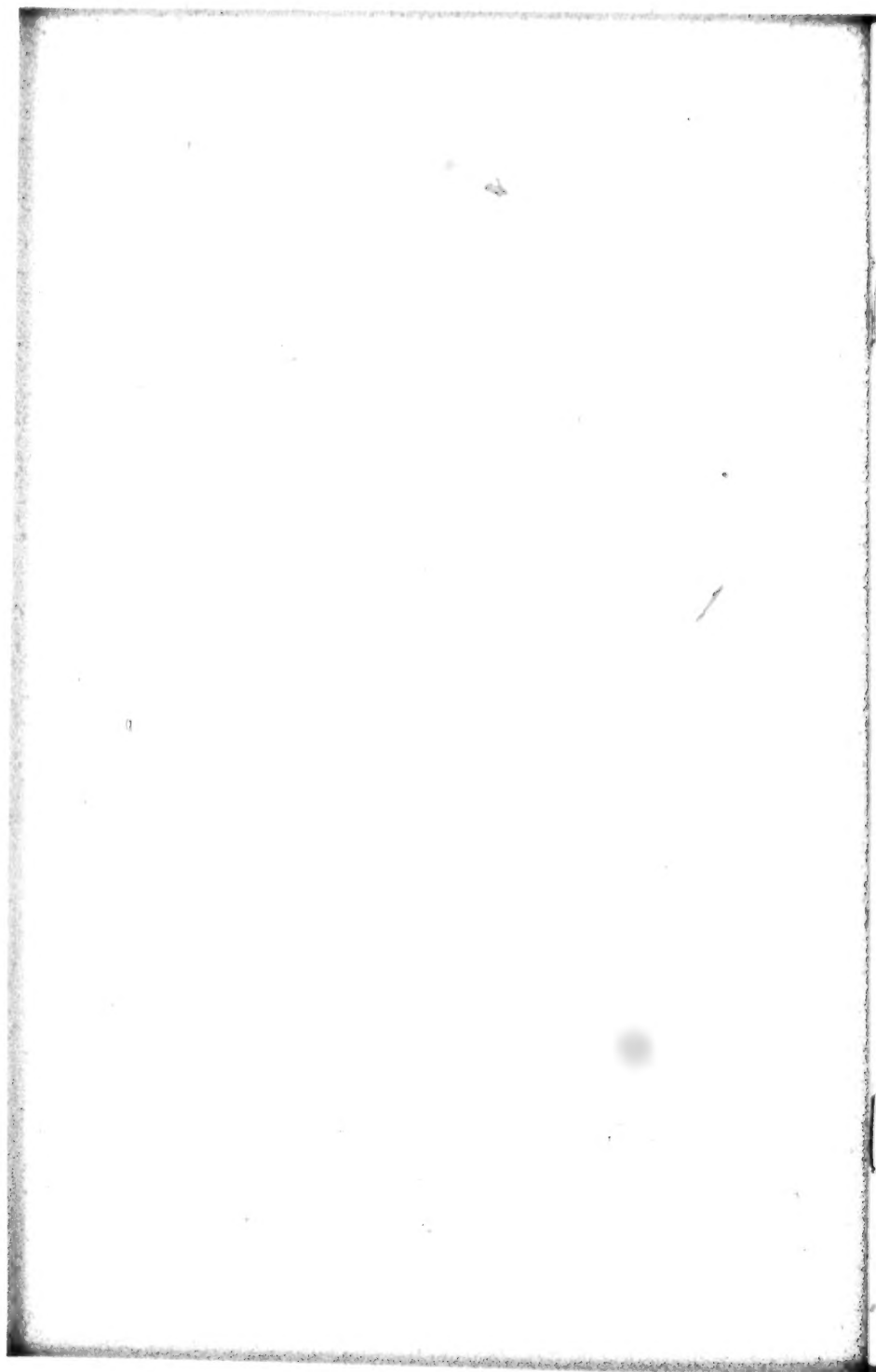
On Appeal from the United States District Court for  
the Central District of California

Before: CHAMBERS, KILKENNY and CHOY, Circuit  
Judges.

PER CURIAM:

The order of the district court dismissing the petition for mandamus is affirmed.

We find a lack of subject matter jurisdiction.



MAY 10 1973

MICHAEL RODAK, JR., CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1371

JOHNNIE M. WALTERS, COMMISSIONER  
OF INTERNAL REVENUE,

*Petitioner,*

v.

"AMERICANS UNITED" INC., ETC., *et al.*,

*Respondents.*

RESPONSE TO PETITION  
FOR WRIT OF CERTIORARI

ALAN B. MORRISON

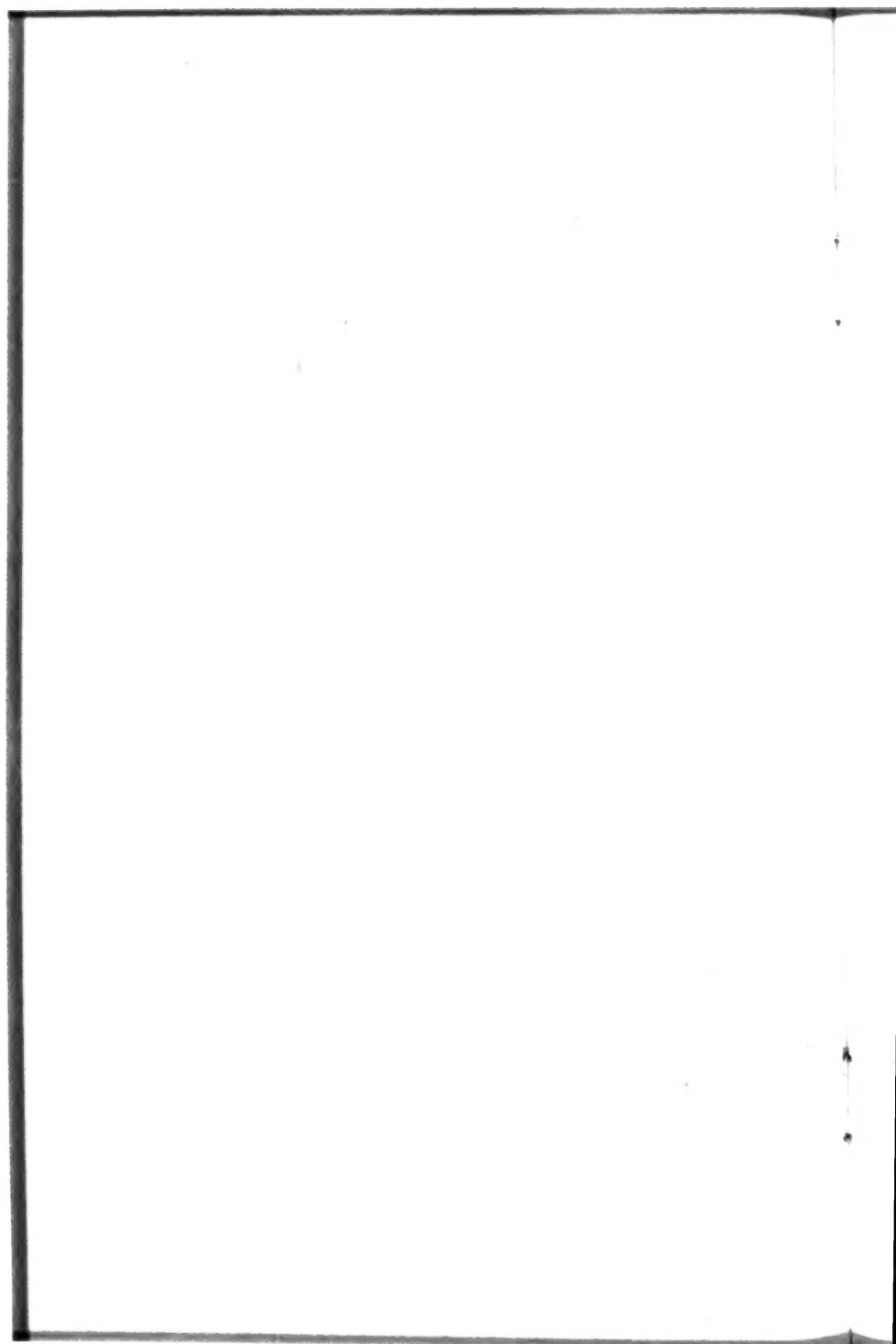
Room 515 - 2000 P Street, N.W.  
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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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No. 72-1371

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JOHNNIE M. WALTERS, COMMISSIONER  
OF INTERNAL REVENUE,

*Petitioner,*

v.

“AMERICANS UNITED” INC., ETC., *et al.*,

*Respondents.*

---

RESPONSE TO PETITION  
FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Anti-Injunction Act, 26 U.S.C. § 7421, and the Declaratory Judgment Act, 28 U.S.C. § 2201, absolutely bar an educational organization, which has had its status as a 501(c)(3) charitable organization revoked by the Internal Revenue Service, from challenging the constitutionality of the statute under which the revocation took place by a direct action in the district court to enjoin the enforcement of that statute, when the issue presented is fundamentally irrelevant to any determination of tax liability for that organization?

## RESPONDENT'S STATEMENT

In 1950 respondent "Americans United", incorporated as Protestants and Others Americans United for Separation of Church and State, was granted a ruling by the Internal Revenue Service that as a non-profit educational corporation, it was exempt from income taxation under Section 101(6) of the Internal Revenue Code of 1939, the predecessor of Section 501(c)(3) of the present code, and that contributions to it were deductible under Section 23(o)(2) of the 1939 code which is now Section 170(c)(2). In 1958 the Service began an investigation of respondent and eventually concluded that in connection with its program to maintain the separation of church and state, it had engaged in substantial attempts to influence legislation and that it was no longer eligible to retain its status under Sections 501(c)(3) and 170(c)(2). Accordingly, by letter dated April 25, 1969, the Service revoked the 1950 ruling, but permitted respondent to continue its exemptions from income taxation as a social welfare organization under Section 501(c)(4).

However, the revocation had the immediate and substantial effect of greatly reducing contributions to respondent, since donors could no longer be assured of deducting contributions to it under Section 170(c)(2), with the result that for the first time in its history, respondent operated in fiscal 1970 at a deficit. Therefore, on July 30, 1970, respondent and two contributors brought suit in the United States District Court for the District of Columbia challenging the lawfulness of the ruling revocation, principally on constitutional grounds. The complaint sought the convening of a three judge court under 28 U.S.C. §2282, to enjoin enforcement of the portions of Sections 170(c)(2) and 501(c)(3) relied upon by the Service in revoking respondent's ruling.

Petitioner's response was a motion to dismiss the complaint on the grounds that both the Anti-Injunction Act, 26 U.S.C. §7421, and the Declaratory Judgment Act, 28 U.S.C. §2201, specifically preclude the district court from assuming jurisdiction in this case, and therefore it was improper even to convene a three judge court to consider the constitutional question presented. The district court agreed and dismissed the complaint for those reasons, and in addition found the absence of a substantial constitutional question. On appeal, the United States Court of Appeals for the District of Columbia unanimously reversed the lower court's ruling, holding that in this case nothing in the Anti-Injunction Act or the Declaratory Judgment Act precluded the maintenance of a suit challenging the constitutionality of the revocation of a 501(c)(3) ruling by the organization whose ruling is revoked.<sup>1</sup> The Court also found that there was a substantial constitutional issue raised by respondent, and it remanded the action for the convening of a three judge court to consider the merits of the controversy.

#### RESPONDENT'S POSITION WITH RESPECT TO THE GRANTING OF THE WRIT

The decision of the Court of Appeals is clearly correct and should be affirmed. Contrary to the contentions of petitioner, it does not constitute a "serious threat to federal tax administration in general and to the advance rulings program in particular" (Pet. p. 7), since, as the Court of Appeals recognized, the decision creates a narrow category of instances in which judicial review may

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<sup>1</sup>It affirmed the district court with respect to the individual donors, and no petition for a writ of certiorari has been filed with respect to that portion of the court's decision.

be invoked other than by way of a suit for refund or petition in the tax court (App. B. pp. 34-35). In the lower courts petitioner had contended that since respondent was exempt from income taxation under Section 501(c)(4), the method to challenge the ruling revocation was by a suit brought by a contributor who was denied a charitable deduction for his gift to respondent. That position has apparently now been abandoned, and petitioner contends that the proper method to raise the issue of the constitutionality of applying the antilobbying provisions of Sections 501(c)(3) and 170(c)(2) to respondent is in an action by respondent contesting the legality of imposing employment taxes (F.U.T.A.) which are not imposed against 501(c)(3) organizations but are imposed against 501(c)(4) groups (Pet. pp. 4, 8, 10 n. 3). This position, which was first taken by the Government in its Supplemental Memorandum on appeal filed in August 1972, just three weeks before oral argument and years after these proceedings began, was found by the Court of Appeals to be "so far from the mainstream of the action and relief sought as to hardly be considered adequate" (App. B. p. 32, n. 13). The Court also noted the uncertainty of even that procedural device and quite correctly decided that it made no sense to litigate the constitutionality of federal income tax laws in a suit involving the payment of unemployment taxes.

Had the unemployment tax issue been timely presented, the record would have contained far more on the question of the inadequacy as well as the inappropriateness of the remedy suggested. In any event it is apparent that nothing in either the Anti-Injunction or the Declaratory Judgments Acts would be violated by permitting the maintenance of a direct action raising the constitutional issues in this case rather than requiring the

respondent to take a chance on being able to have the issue determined in an irrelevant suit involving unemployment taxes. Apparently petitioner does not now dispute that respondent, rather than merely a donor, has a right to obtain a judicial determination of this question, but he claims that the unemployment tax suit is the exclusive vehicle. We respectfully suggest that the Court of Appeals correctly dismissed such remedy as inadequate, and its decision should thus be affirmed.

Respondent does not dispute that the decision below is in apparent conflict with the results in several other similar cases in other circuits (Pet. pp. 9-10). While there are certain arguable distinctions between at least some of those cases and this, the differences are such that it would be helpful to all concerned to have the issues resolved and have this Court articulate the differences, if any, which warrant different outcomes on the jurisdictional issue.

Respondent does not agree, however, that the decision below either conflicts with *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962) (Pet. pp. 8-9), or that it would unduly burden the administration of the tax laws (Pet. pp. 11-13). In *Enochs* this Court in no way purported to decide for all time, that the only exemptions to the Anti-Injunction and Declaratory Judgment Acts were described in that opinion. Cases of this kind were simply not before this Court in *Enochs*, and nothing contained in it is inconsistent with the decision of the Court of Appeals here.

Petitioner's claim that the decision below will disrupt the operations of the Service's rulings program is also without merit. Petitioner does not deny that respondent has the right to review the revocation of its ruling; his quarrel is with the procedure chosen. Thus, disruption, if there be any, will occur, and the only question is the

form of the lawsuit in which the constitutional question is to be raised. Moreover, since it is the Department of Justice and not the Internal Revenue Service which must defend these cases, the burden will not fall on the rulings branch which will simply go about its business of deciding questions presented to it and passing on those decisions to the taxpayer, and, if a defense is required, to the Justice Department. Since the only "tax" at issue is the small amount due on unemployment payments—\$981.13 for respondent on February 19, 1970 (Pet. p. 4, n. 2)—it is obvious that no great disruption of the revenue will result from the decision of the Court of Appeals. That Court recognized this potential for revenue interference and, we suggest, correctly discounted the "flood gates" argument (App. B. p. 35).

## CONCLUSION

Although respondent contends that the decision below is entirely correct and should be affirmed, it recognizes that there are apparent conflicts between that decision and some in other circuits. Therefore, respondent does not oppose the granting of the writ to consider the jurisdictional question, but it does strongly urge the Court to affirm the decision below.<sup>2</sup>

Respectfully submitted,

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May 4, 1973

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<sup>2</sup>Since petitioner has not raised the propriety of the decision below with respect to its holding that a substantial constitutional question requiring the convening of a three judge court has been raised, respondent assumes that the only question to be heard on the merits will be the jurisdictional issue. In addition, although petitioner purportedly reserved the right to raise a sovereign immunity defense should the writ be granted (Pet. p. 11, note 4), respondent strongly opposes the granting of the writ on that issue which cannot be briefed unless it was presented in the petition. See Rule 23, Section 1(c) of the Rules of this Court. Moreover, as recognized by the Court of Appeals the sovereign immunity issue has long since been settled by this Court, and this case falls within the recognized exceptions to that doctrine (Pet. App. B. p. 35).

No. 72-1371

Supreme Court, U. S.  
FILED

AUG 16 1973

**In the Supreme Court of the United States**

OCTOBER TERM, 1973

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**DONALD C. ALEXANDER, COMMISSIONER OF  
INTERNAL REVENUE, PETITIONER**

**v.**

**"AMERICANS UNITED" INC., ETC., ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**BRIEF FOR THE PETITIONER**

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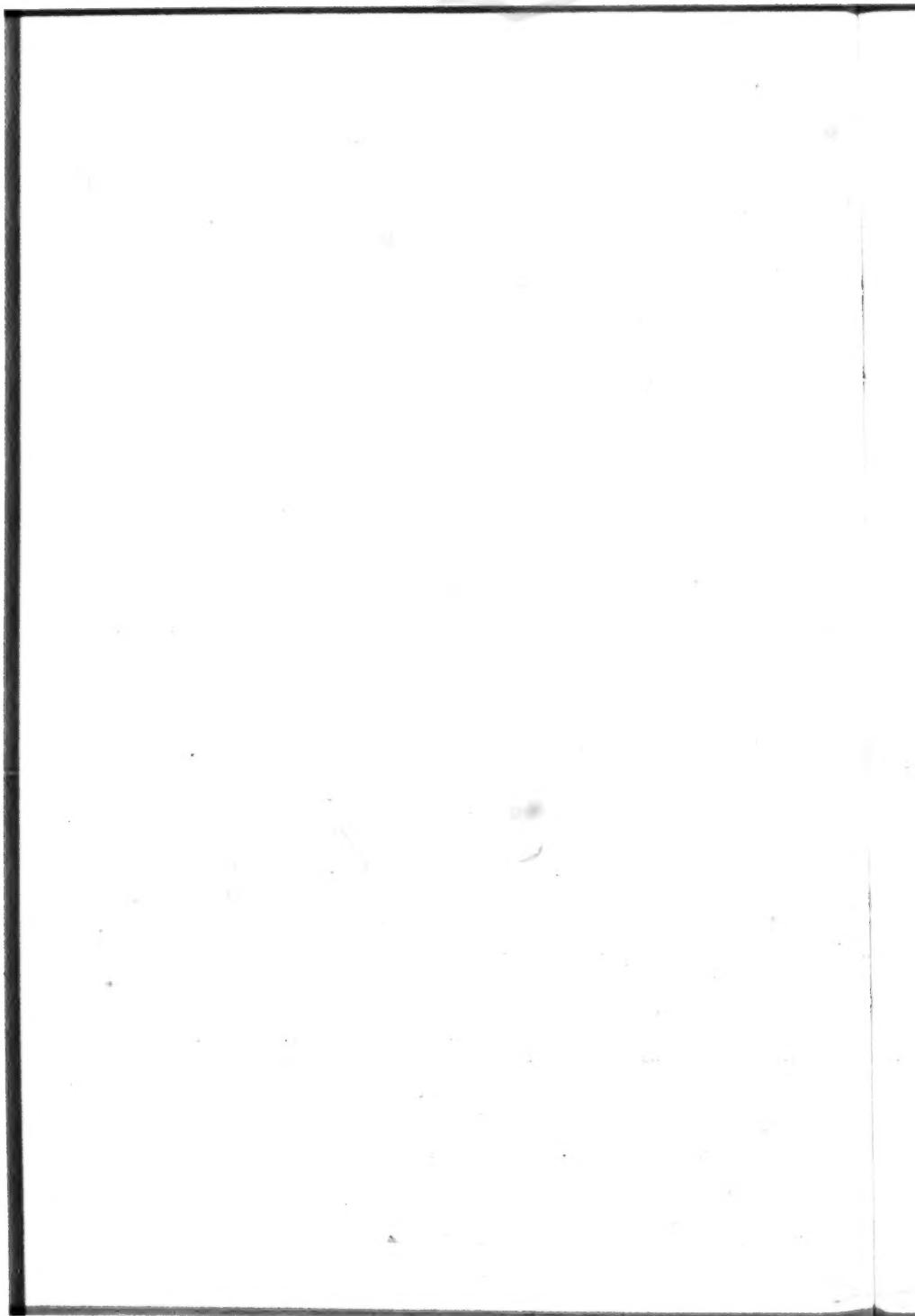
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**In the Supreme Court of the United States**

OCTOBER TERM, 1973

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No. 72-1371

DONALD C. ALEXANDER, COMMISSIONER OF  
INTERNAL REVENUE, PETITIONER

v.

"AMERICANS UNITED" INC., ETC., ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR THE PETITIONER**

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**OPINIONS BELOW**

The opinion of the district court (R. 21)<sup>1</sup> is not officially reported. The opinion of the court of appeals (R. 22-45) is not yet officially reported.

**JURISDICTION**

The judgment of the court of appeals (R. 46) was entered on January 11, 1973. The petition for a writ

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<sup>1</sup> "R." references are to the separately bound record appendix.

of certiorari was granted on June 4, 1973. (R. 48.) The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### QUESTION PRESENTED

The corporate respondent (respondent) had an advance ruling recognizing its exemption from income taxes pursuant to Section 501(c)(3) of the Internal Revenue Code of 1954 and assuring its contributors of deductibility of their contributions under Section 170(c)(2). In 1969, the Commissioner withdrew the exemption ruling on the ground that the respondent had engaged in lobbying activities prohibited by Sections 170(c)(2) and 501(c)(3), and then issued a ruling under Section 501(c)(4) recognizing respondent's exemption from tax but not assuring deductibility of contributions. The question presented is:

Whether the respondent is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a), and the Declaratory Judgment Act, 28 U.S.C. 2201-2202, or otherwise, from obtaining injunctive or declaratory relief requiring the Commissioner to issue a ruling that respondent is exempt under Section 501(c)(3), and therefore that contributions to it are deductible under Code Section 170(c)(2).

### STATUTES INVOLVED

The relevant provisions of the Internal Revenue Code and the Declaratory Judgment Act are set forth in the Appendix, *infra*, pp. 59-63.

## STATEMENT

The respondent is organized under the laws of the District of Columbia as a nonprofit, educational corporation. (R. 11-12.) On July 3, 1950, the Commissioner issued a ruling recognizing that respondent qualified for tax exemption under Section 101(6) of the Internal Revenue Code of 1939, the predecessor to Section 501(c)(3) of the 1954 Code. (R. 7.) As a result of this ruling, contributors to the respondent were assured that their contributions would be deductible under Section 23(o)(2) of the 1939 Code, and later under Section 170(c)(2) of the 1954 Code. On April 25, 1969, the Commissioner, by letter ruling, revoked the 1950 ruling on the ground that the respondent had violated Sections 170(c)(2)(D) and 501(c)(3) and the applicable Regulations by devoting a substantial part of its activities to attempts to influence legislation. (R. 7-10.)

The respondent is still exempt from income taxes as a "social welfare" organization under Section 501(c)(4) of the Code, in spite of the withdrawal of the tax exemption ruling under Section 501(c)(3). (R. 24.) Organizations which are exempt from tax under Section 501(c)(4), however, are not eligible for tax-deductible contributions under Section 170. In addition, organizations exempt from tax under Section 501(c)(3) are exempt from the payment of unemployment (F.U.T.A.) taxes under Section 3301 and 3306(c)(8) of the Internal Revenue Code of 1954, while organizations which are tax-exempt under

Section 501(c)(4) are liable for these taxes. The Internal Revenue Service advises that the corporate respondent began paying F.U.T.A. taxes in February, 1970, and has continued making payments regularly since that time.<sup>2</sup>

On July 30, 1970 (R. 2), the respondent and two of its benefactors filed suit seeking injunctive and declaratory relief which would declare the Commissioner's administration of the lobbying proscriptions in Sections 170 and 501(c)(3) to be erroneous or unconstitutional, and which would require reinstatement of the respondent's former 501(c)(3) ruling. The respondent brought the suit on behalf of itself, its members, and (R. 13) "all other similarly situated nonprofit corporations which have lost or are being threatened by a loss of their status as 501(c)(3) organizations \* \* \*." The individual respondents sued in their own behalf and in behalf of "all other Federal income taxpayers similarly situated." (R. 12-13.)

In the Amended Complaint, it was first alleged (R. 13, 25) that the Commissioner's administration of the statutory lobbying proscriptions violated the due process rights of the respondent and other similarly situated organizations. The thrust of this allegation, which was given primary emphasis on appeal

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<sup>2</sup> The Service advises that respondent paid F.U.T.A. taxes for 1969 in the amount of \$981.13; for 1970 in the amount of \$1,052.60; for 1971 in the amount of \$889.09; and for 1972 in the amount of \$1,131.36.



(R. 40),<sup>3</sup> was that the Commissioner unconstitutionally allows large tax-exempt organizations to engage in a greater absolute number of political activities than it allows to smaller organizations, since the amount of political activities allowed before the prohibited "substantial" level is reached is measured in proportion to the organizations' total activities. It was also alleged that this application of the "substantial" political activities test violates the rights of the individual respondents under the religion clauses of the First Amendment, since large churches are thereby allowed to engage in a greater number of political activities than are small organizations such as the corporate respondent. In addition, it was alleged that the respondent is an "active advocate of a political doctrine"—namely, an advocate of the religious [sic] clauses of the First Amendment," and that the Commissioner's application of the substantial political activities prohibition in Section 501(c)(3) to the respondent and similarly situated organizations violates the rights of the members of these organizations to freedom of speech, freedom of the press, and freedom to petition for redress of grievances. (R. 12-15.)

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<sup>3</sup> Respondents did not advance in the court of appeals their additional allegations (R. 15-16) that the statutory words "substantial" and "propaganda" in Sections 170 and 501(c)(3) constitute an "invalid unconstitutional delegation of legislative power" in that they are "lacking in specificity \* \* \*" and "devoid of meaning and inadequate as a standard for administrative action." The court of appeals thus had no opportunity to rule on these contentions.

The Amended Complaint concluded by asserting that the corporate respondent had no adequate remedy at law since no taxes had been assessed as a result of the revocation of the ruling under Section 501(c) (3) and, therefore, the respondents were not seeking, and could not seek, a refund of taxes. It also stated that irreparable injury would be suffered if relief were not granted since "[a]s a result of \* \* \* [petitioner's] action the \* \* \* [respondent] has operated at a loss for the year 1970, for the first time since 1949." (R. 15.)

As relief, respondents requested (1) that the court issue a declaratory judgment that "the exemption clauses of Section 501(c) (3) are separable from the remainder of the section and are null and void"; (2) that the Commissioner be enjoined "from enforcing Sections 170(c) and 501(c) (3) \* \* \* so as to deprive the individual \* \* \* [respondents] and others similarly situated of the benefit of tax advantages in the exercise of their First Amendment rights"; and (3) that the Commissioner be required to reevaluate the withdrawal of the respondent's ruling "in the light of the final decision in this case." (R. 16.) In order to secure this relief, respondent requested the convening of a three-judge court. (R. 16.)

The district court held that the suit was barred by the Anti-Injunction and Declaratory Judgment Acts and dismissed it for lack of jurisdiction. (R. 21.) The court of appeals held that the action could not be brought by the individual respondents, since they sought relief which would enjoin the Commissioner

from assessing taxes on those dollars contributed by them to the corporate respondent, which relief was barred by the Anti-Injunction Act. (R. 30-32.) With respect to the corporate respondent, however, the court held that the suit was not barred by the Anti-Injunction and Declaratory Judgment Acts. It stated that those jurisdictional prohibitions were inapplicable because (1) it was alleged that the substantial political activities test was unconstitutional; (2) the "primary design" of the suit is to prevent diversion of contributed funds away from the organization, the suit thus does not "directly or 'indirectly'" concern taxes levied upon the organization, and "[t]he restraint upon assessment and collection is at best a collateral effect;" and (3) the respondent would sustain irreparable injury for which there was no adequate remedy at law in the form of a refund suit. (R. 32-38.) The court of appeals also held that the suit was not barred by sovereign immunity. (R. 38-39.) Finally the court of appeals held that a three-judge court should be convened, reasoning that respondent's due process contention raised a substantial constitutional question. (R. 39-43.)

## SUMMARY OF ARGUMENT

### I

1. Since the founding of the Republic, all three branches of government have recognized that the prompt and efficient collection of the federal revenues is a paramount national concern. The First Congress invested the Treasury Secretary with broad authority

to make the myriad of administrative decisions, including the promulgation of advance "rulings," necessary for the expeditious assessment and collection of the revenues.<sup>4</sup> For several decades, Congress was reluctant to allow federal taxpayers any waiver of the government's immunity from suit respecting these administrative decisions; it was not until the middle of the nineteenth century that Congress permitted taxpayer suits to review the Executive's administrative decisions in refusing to allow claims for refund.

Concomitantly, however, Congress in the Anti-Injunction Act expressly prohibited the courts' exercise of their injunctive powers in tax assessment or collection matters. Later, in the 1930's, when the then recently authorized declaratory judgment suits threatened to paralyze the administration of the processing taxes, Congress enacted an even broader prohibition against declaratory suits in matters respecting "Federal taxes." While this Court has never had occasion to rule on the scope of the latter prohibition, it has consistently refused to allow injunctive suits to restrain a tax assessment or collection absent a showing of irreparable injury to the complainant without legal remedy, and, in addition, a showing of an abuse of the executive power so blatant as to render it certain that revenue officials cannot prevail on the merits of their claims. *Enochs v. Williams Packing Co.*, 370 U.S. 1.

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<sup>4</sup> See generally, *The Work and Jurisdiction of the Bureau of Internal Revenue*, GPO (1948).

It is against this deeply rooted policy of barring the equity powers of the federal courts from impinging on the administrative determination process necessary for revenue collection that the instant injunctive suit must be viewed. Respondent's advance letter ruling assuring that its contributors could deduct their donations was withdrawn in 1969 because of the substantiality of respondent's lobbying activities. Respondent now seeks broad injunctive relief requiring reinstatement of the ruling and allowance of the deductions on the ground that the "substantial" lobbying test is unconstitutional. Respondent alleges that other available remedies—a suit for refund of F.U.T.A. taxes, a Tax Court petition, or a refund test suit by a friendly contributor—are inadequate and seeks an immediate injunction. The court of appeals held, and respondent apparently does not dispute, that the two-part *Williams Packing* standard for allowing injunctive relief has not been satisfied. Instead, the appellate court fashioned *sua sponte* a new tripartite exception to the Anti-Injunction Act and then held that respondent had satisfied it. The court's opinion respecting each of the three segments of its novel test runs counter to decisions of this Court; as a whole, the test would impose the equity powers of the federal courts heavily on the tax rulings system and seriously disrupt revenue administration.

First, the court of appeals held that the injunctive complaint stated a valid claim since it alleged that the Commissioner's standard for decision is in violation of the Constitution. This holding contravenes

numerous decisions of this Court that the constitutional character of the complainants' claims is irrelevant for purposes of determining application of the Anti-Injunction Act. The same factor has been rejected by three courts of appeals, including the Fourth and Fifth Circuits, where private segregated schools alleged that the Commissioner's withdrawal of deductibility assurance rulings from racially discriminatory schools was unconstitutional. If a claimed violation of constitutional rights were allowed as a basis for an exception to the Anti-Injunction Act, many suits would doubtless be framed in constitutional terms. Preliminary injunctions could well prevent the Commissioner from executing tax determinations and other assessment activities until lengthy trial and appellate proceedings could determine the merits of the claims.

The second segment of the court of appeals' test brings into play its holding that the respondent's "primary design" was to prevent the adverse "collateral" effect of decreased contributions, rather than a design directly or indirectly to restrain tax assessments. The vagueness of this distinction between "collateral" and "direct or indirect" effects, based on the complainant's subjective intent, would impose an intolerable burden on the Internal Revenue Service and would enormously increase the range of complainants eligible to seek injunctions against the collection of the revenue.

The third segment of the court of appeals' test purports to mirror the second part of the *Williams*

*Packing* exception— the showing of irreparable injury for which there is no adequate legal remedy. The test is, of course, relevant, but it was incorrectly applied here. The court gave no reason why a suit by respondent for refund of unemployment taxes would be an inadequate remedy—indeed, *Williams Packing* itself involved taxes relating to employment. In any event, the legal issues presented here respecting respondent's eligibility for a deductibility assurance ruling could quickly be determined in a refund suit brought by a friendly donor, such as an officer or employee of respondent.

Even apart from the Anti-Injunction Act prohibitions, the tax exception to the Declaratory Judgment Act also bars the instant suit. The latter statute prohibits declaratory judgment suits "with respect to Federal taxes," together with injunctions in aid thereof. The legislative history of this tax exception indicates that Congress intended that tax determinations, assessments, and collections should be litigable only in the usual refund and Tax Court actions. The author of the Declaratory Judgment Act and other commentators have indicated that its prohibition on suits respecting taxes is broader than the Anti-Injunction Act .

2. The present suit is also barred by sovereign immunity. Since at least 1792, Treasury Department officials have apparently issued and withdrawn rulings such as that here free from judicial interference. This Court has specifically held that suits to alter these rulings cannot be brought absent the Government's consent. *Louisiana v. McAdoo*, 234 U.S. 627.



There is no warrant for the exception from the sovereign immunity bar relied on by the court of appeals, *i.e.*, that it was alleged that the Commissioner was acting in an unconstitutional manner. The exception does not apply where, as here, the injunction suit seeks broad affirmative relief against the Executive officials, such as requiring them to issue deductibility assurance rulings to respondent and all similarly situated organizations.

## II

Even if this Court should decide that the district court had jurisdiction, it will not be necessary to decide finally the substantive Constitutional questions involved. In the lower courts, the parties focused on these issues to determine if the second *Williams Packing* test was met; respondent has apparently abandoned that position, and, accordingly, it is only necessary to determine here if the Constitutional questions are "substantial" for purposes of convening a three-judge court.

Respondent's contention that the statutory proscription against substantial lobbying activities unconstitutionally discriminates in favor of wealthy organizations is without merit. Lobbying expenditures are not measured simply in terms of activities, but also in terms of relative time, frequency, and number of programs and activities devoted to lobbying. Accordingly, the statutory test carries little if any advantage to wealthy organizations *per se*. In any event, this Court in the *San Antonio Independent School District* case specifically rejected the



type of relative-wealth-discrimination argument which respondent makes here. As for respondent's First Amendment contentions, the court of appeals properly held that they were disposed of by this Court's decision in *Cammarano v. United States*, 358 U.S. 498.

## ARGUMENT

### I

#### THE LOWER COURTS HAD NO JURISDICTION TO ALLOW INJUNCTIVE AND DECLARATORY RELIEF RESPECTING PETITIONER'S REVOCATION OF THE TAX RULING

##### A. This suit is barred by the Anti-Injunction Act

##### 1. *Historical background and the statutory scheme for judicial review of tax decisions*

The federal Anti-Injunction Act provides, with exceptions not here relevant, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person \* \* \*." The statute was enacted in 1867<sup>5</sup> in order to prevent the wave of injunctive suits which had swept over the state taxation systems from inundating the federal tax system. See *State Railroad Tax Cases*, 92 U.S. 575, 613.<sup>6</sup> In the latter case, the Court em-

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<sup>5</sup> The statute originated as Section 10 of the Act of March 2, 1867, c. 169, 14 Stat. 471, and is now codified as Section 7421(a) of the Internal Revenue Code of 1954.

<sup>6</sup> Prior to the enactment of the Anti-Injunction Act, at least two federal courts had indicated their willingness to

phasized the important purpose of the Anti-Injunction Act, stating (*ibid.*) that it

shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. [Emphasis in original.]

And in *Cheatham v. United States*, 92 U.S. 85, 89, the Court outlined the grave dangers which would accompany intrusion of the injunctive power of the courts into the administration of the revenue:

If there existed in the courts \* \* \* any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. \* \* \* [A] free course of remonstrance and appeal is allowed within the departments before the money is finally exacted \* \* \*. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid \* \* \*.

In general, then the strict prohibition on injunctive suits is founded on the Executive's need to assess and collect taxes as quickly and as efficiently as possible,

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issue injunctions against the assessment or collection of federal taxes. *Georgia v. Atkins*, 10 Fed. Cas. No. 5,350 (N.D. Ga.); *Cutting v. Gilbert*, 6 Fed. Cas. No. 3,519 (S.D. N.Y.). There is no legislative history respecting the purpose of Congress in enacting the Anti-Injunctive Act. See Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 Harv. L. Rev. 109 (1935).

with a minimum of delay and interference from the judicial branch. See *State Railroad Tax Cases*, *supra*, 92 U.S. at 575; *Cheatham v. United States*, *supra*; *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7. The assessment and collection of the federal revenues requires the Treasury Department to make literally millions of administrative decisions, including the acceptance of tax returns for filing, audits of returns, issuance of revenue rulings, and promulgation of regulations. These and numerous other administrative decisions are potentially the subject of litigation between taxpayers and the government. Congress, however, has wisely limited the types of tax administrative actions which may be reviewed by the courts. First, a taxpayer may obtain review of a notice of deficiency by filing a timely petition in the Tax Court. Section 6212 and 6213 of the Internal Revenue Code of 1954.<sup>7</sup> Secondly, a taxpayer may obtain review of the denial of a claim for refund (or the failure to act thereon for a six-month period) by means of a suit for refund in a district court or in the Court of Claims. Sections 6532 and 7422 of the Code; 28 U.S.C. 1346 and 1491.<sup>8</sup> With the exception of a few

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<sup>7</sup> The existence of the Tax Court review procedure does not conflict with the government's fundamental right to assess and collect taxes prior to litigation. Under the jeopardy assessment procedures of Code Section 6861, the Commissioner may assess and collect taxes at any time before or during Tax Court proceedings if he "believes that the assessment or collection \* \* \* will be jeopardized by delay \* \* \*."

<sup>8</sup> A taxpayer may also raise his non-liability for a tax as a defense in a collection suit. *United States v. O'Connor*, 291 F. 2d 520 (C.A. 2).

other miscellaneous types of suits authorized by specific statutes which are not relevant here,<sup>9</sup> the administration of the Internal Revenue Code is otherwise committed by Congress to the discretion of the Secretary of the Treasury and the Commissioner of Internal Revenue and is not subject to judicial review. See generally, *The Work and Jurisdiction of the Bureau of Internal Revenue*, GPO (1948); cf. Section 10 of the Administrative Procedure Act, 5 U.S.C. 701. As this Court said in the early case of *Snyder v. Marks*, 109 U.S. 189, 193-194:

\* \* \* the system prescribed by the United States in regard to \* \* \* internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, an enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by \* \* \* [the Anti-Injunction Act], that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed \* \* \*.

In only one type of situation has this Court allowed a severely limited exception to the statutory prohibi-

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<sup>9</sup> See, e.g., Section 7426 of the Internal Revenue Code (suits by non-taxpayers whose property has been levied upon to satisfy the tax liability of another); 28 U.S.C. 2410 (suit by property owner to quiet title to property and formally remove a tax lien which has been satisfied by payment of the taxes).

tion on injunctions against tax assessment or collection activities. In *Enochs v. Williams Packing Co.*, *supra*,<sup>10</sup> the Court held that a taxpayer might obtain an injunction against assessment or collection of taxes only if he satisfied a twofold test: first, he must show that "it is clear that under no circumstances could the Government ultimately prevail" on the merits of its legal claim; in addition he must show that "equity jurisdiction otherwise exists" because of the existence of irreparable injury for which there is no adequate legal remedy. In the instant case, the court of appeals refused to apply the *Williams Packing* test (see Pet. App. 40) and devised a new test of its own. Respondent, moreover, both here (Resp. to Pet. 5) and in the court below, apparently has recognized that it cannot satisfy the twofold *Williams Packing* test, and it argues instead that there exist other exceptions to the Anti-Injunction Act which are applicable in this case.

**2. *The decision below contravenes the express terms of the Anti-Injunction Act***

Before considering in detail the alternative exception to the Anti-Injunction Act set forth by the court of appeals, we examine briefly the facts of this case in relation to the statutory language. In 1950, respondent received an advance letter ruling from the

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<sup>10</sup> In *Enochs*, the Court clarified the "exceptional circumstances" test enunciated in *Miller v. Nut Margarine Co.*, 284 U.S. 498 and other cases. See *Allen v. Regents*, 304 U.S. 439, 449, and *Hill v. Wallace*, 259 U.S. 44, discussed at page 30, *infra*.

Internal Revenue Service advising that it was exempt from income taxes under the predecessor of Code Section 501(c)(3), Appendix, *infra*, p. 60, and that contributions to respondent would be deductible by the donors under the predecessor of Section 170(c)(2), Appendix, *infra*, pp. 59-60. Since all organizations exempt from tax under Section 501(c)(3) are also exempt from federal unemployment taxes under Code Section 3306(c)(8), Appendix, *infra*, pp. 61-62, the letter ruling necessarily assured respondent that it would not have to pay the unemployment taxes.

In 1969, this letter ruling was revoked, on the ground that respondent had violated Section 170(c)(2)(D), Appendix, *infra*, p. 59, and 501(c)(3) by devoting a substantial part of its activities to attempts to influence legislation. (R. 7-10.) At about the same time, the Internal Revenue Service issued respondent another letter ruling advising that it was still exempt from taxation under Section 501(c)(4) as an organization "operated exclusively for the promotion of social welfare \* \* \*." This action was possible since Section 501(c)(4), Appendix, *infra*, p. 61, does not contain a prohibition against lobbying, as do Sections 170(c)(2) and 501(c)(3). As a direct and immediate result of this substitution of the Section 501(c)(4) ruling for the Section 501(c)(3) ruling, contributors to taxpayer became liable for income tax deficiency assessments for any deductions taken with respect to subsequent contributions to respondent.<sup>11</sup> In addition, respondent itself became li-

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<sup>11</sup> Although revocation of respondent's tax exemption ruling was retroactive in effect (R. 10), withdrawal of its eligibility



able for the payment of federal unemployment taxes. For example, in 1970, the year in which this suit was filed, the respondent paid a total of \$981.13 in federal unemployment taxes as a result of the revocation of its Section 501(c)(3) exemption ruling.<sup>12</sup>

It is clear, therefore, if the requested injunction is allowed here, tax assessments with respect to both respondent and its contributors will have been enjoined, in direct contravention of the prohibition of the Anti-Injunction Act. In *Bob Jones University v. Connally*, 73-1 U.S.T.C., par. 9185, rehearing denied, 73-1 U.S.T.C., par. 9306 (C.A. 4), petition for writ of certiorari pending, No. 72-1470, and *Crenshaw County Private School Foundation v. Connally*, 73-1 U.S.T.C., par. 9287 (C.A. 5), petition for writ of

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for tax deductible contributions was solely prospective. Rev. Proc. 68-17, 1968-1 Cum. Bull. 806, superseded, Rev. Proc. 72-39, 1972-2 Cum. Bull. 818.

<sup>12</sup> Many exempt organizations in similar circumstances would additionally have become liable for the first time for federal social security (F.I.C.A.) taxes, since only organizations exempt under Section 501(c)(3)—not Section 501(c)(4)—are also exempt from F.I.C.A. taxes. Code Sections 3101(a) and 3121(b)(8)(B). However, respondent alleged in the court of appeals (Supp. Memo. 3-4) that it had elected pursuant to Section 3121(k) to pay F.I.C.A. taxes even prior to the revocation of its Section 501(c)(3) ruling. Because of this election, the respondent is barred for a period of two years from revoking the election and filing suit for refund of the F.I.C.A. taxes. Respondent apparently does not wish to pursue this course of action, since it would then be barred by Code Section 3121(k)(3) from renewing the election to pay the F.I.C.A. taxes and in this manner provide retirement benefits for its employees. See Respondent's Supplemental Memorandum in the court of appeals, p. 4.

certiorari pending, No. 73-170, the courts refused injunctive relief in similar circumstances. There the Treasury Department had withdrawn, or threatened to withdraw, the complainant schools' tax exemptions under Section 501(c)(3) and their deductibility assurance ruling under Section 170(c)(2), on the ground that the schools had racially discriminatory admissions policies. The courts properly rejected the schools' contentions that the Anti-Injunction Act was inapplicable, reasoning that the requested injunction would preclude taxation of the funds contributed by donors and the income of the schools, and would thus restrain tax assessment.<sup>13</sup> These decisions properly recognize the long-standing policy reasons for excluding the courts' injunctive power from the judicial system in the tax area.

**3. *The tripartite exception to the Anti-Injunction Act created by the court of appeals below is without foundation and would disrupt revenue administration***

The court of appeals here departed from the *Williams Packing* standard applied in *Bob Jones* and *Crenshaw*, and held that the Anti-Injunction Act was inapplicable on the basis of a novel tripartite exception. We submit that the approach devised *sua*

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<sup>13</sup> The Fourth Circuit on rehearing distinguished the instant case on the mistaken assumption that loss of the tax exemption ruling under Section 501(c)(3) would not result in greater tax liabilities for the respondent. The Fourth Circuit apparently overlooked the respondent's F.U.T.A. tax liability. In any event, the effect of an injunction in preventing assessment of taxes against donors is sufficient to require application of the Anti-Injunction Act.



*sponte* by the court of appeals here has no support in the statutory language or the decided cases, and would lead to grave interference with revenue administration.

(i) The first test set forth by the court of appeals involves the nature of the substantive claim asserted by the complainant. The court emphasized that respondent does not attack the "applicability of a test or \* \* \* [its] ability to qualify under presently existing standards," but rather contends that "the clause disqualifying organizations which devote a substantial part of their activities to political propaganda and lobbying should be elided as unconstitutional \* \* \*." (R. 35.) In addition, the court quoted with approval the opinion of the district court in *Bob Jones University v. Connally*, 341 F. Supp. 277 (D.S.C.) (since reversed on appeal), which allowed an injunction in similar circumstances where the constitutionality of the Treasury's policy was challenged.

The fact that the instant case involves a claim that the Treasury officials' policy is unconstitutional, however, is irrelevant for purposes of the prohibitions set forth in the Anti-Injunction Act and the Declaratory Judgment Act. It has long been held that one or both of these statutes bar suits to restrain assessment or collection, regardless of the constitutional character of the claims presented. *E.g.*, *Bailey v. George*, 259 U.S. 16; *California v. Latimer*, 305 U.S. 255; *Dodge v. Osborn*, 240 U.S. 118, 121; *Jules Hairstylists of Maryland v. United States*, 268 F. Supp. 511, 514, 515 (D.Md.), affirmed *per curiam*,

389 F. 2d 389 (C.A. 4), certiorari denied, 391 U.S. 934; *Harvey v. Early*, 160 F. 2d 836, 837 (C.A. 4) (citing cases); *Pietsch v. President of the United States*, 434 F. 2d 861, 862 (C.A. 2) (Clark, Ret. J.); *Collins v. Daly*, 437 F. 2d 736, 739 (C.A. 7). Indeed, three of the other four courts of appeals decisions which have involved attempts by tax exempt organizations to enjoin the revocation of their eligibility for tax deductible contributions have also involved claims of constitutional violations.<sup>14</sup>

If a claimed violation of constitutional rights were allowed as a basis for an exception to the Anti-In-

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<sup>14</sup> *Bob Jones University v. Connally*, *supra*, and *Crenshaw County Private School Foundation v. Connally*, *supra*, involved claims that the Treasury's policy of denying tax exempt status to racially discriminatory private schools violated taxpayers' rights under the First Amendment. The attempt (R. 35) of the court of appeals in the instant case to distinguish the case of *Jolles Foundation v. Moysey*, 250 F. 2d 166 (C.A. 2), on the ground that it "did not involve the alleged unconstitutionality of a taxing statute," is unfounded. In *Jolles*, the Internal Revenue Service had revoked the deductibility assurance and tax exemption ruling of an organization because of its political activities on behalf of the late Senator Joseph McCarthy. (Brief for the Appellant in the Second Circuit in *Jolles*, p. 6.) The organization brought suit, alleging that the definition of education in Section 39.101 (6)-1(c) of Treasury Regulations 118 (1939 Code) was contrary to the statute and unconstitutionally vague in violation of the due process clause of the Fifth Amendment. (*Id.*, pp. 25-27.) In holding that this suit was prohibited by the tax exception to the Declaratory Judgment Act, the Second Circuit's opinion noted the "lengthy recital of assumed violations of constitutional rights" and the "elaborate" constitutional arguments (250 F. 2d at 169), but nonetheless held that the suit was barred by the tax exception to the Declaratory Judgment Act.

junction Act, many ordinary tax suits would doubtless be framed in constitutional terms in order to circumvent these prohibitions. Only after lengthy trial and appellate proceedings could it be determined whether the claim was in fact constitutional, and, if so, whether it was valid. In the meantime, preliminary injunctions might well prevent the Treasury from assessing and collecting the appropriate taxes and the purpose of the Anti-Injunction Act would be defeated.

(ii) The second element of the court of appeals' test is even less conventional and also disregards both the applicable precedents and the letter and spirit of the congressional restrictions on the equity jurisdiction of the courts in federal tax cases. The court held that the suit was justified because the "primary design" of the respondent was to prevent diversion of contributed funds away from itself, rather than to lower the taxes of its contributors (or, presumably, to avoid the assessment of F.U.T.A. taxes on itself) and consequently, that the restraint on collection of taxes was "collateral" rather than direct (R. 35). We note that the district court had made no factual findings and there was no evidence in the record to establish respondent's "primary design" in bringing the suit. But, in any event, there is no authority in the decisions of this Court or other courts to the effect that the application of the Anti-Injunction Act prohibition should turn on the complainant's subjective intent, and the opinion of the lower court cites none.

Indeed, it is not difficult to understand why the courts have not created an exception to the plain language of the Anti-Injunction Act which would require their attempting to determine the "primary design" of the taxpayer seeking an injunction or whether the effect of the injunction sought would be "collateral" or "direct" with respect to the assessment and collection of taxes.<sup>15</sup> Administration of such

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<sup>15</sup> The court of appeals attempted (R. 37) to distinguish its earlier decision in *Gardner v. Helvering*, 88 F. 2d 746 (C.A. D.C.), certiorari denied, 301 U.S. 684, on the ground that there complainant's taxes were "indirectly" rather than "collaterally" involved. In *Gardner*, the complainant desired to purchase refuse palm oil, the processors of which were subject to a processing tax under a Treasury ruling. Since the complainant was not a processor, and the processor would not handle the oil if it was taxable, the complainant brought suit for an order that the processing tax was invalid and unconstitutional. The court held that the suit was barred by the Anti-Injunction Act, even though the relief would not alter the complainant's tax liabilities and there was no other way for the complainant to challenge the imposition of the tax. The restraint on tax assessment in that case was just as collateral as in the instant case, but the court nevertheless held that the suit was barred by the Anti-Injunction Act.

The court of appeals also attempted (R. 37) to distinguish *West Chester Feed & Supply Co. v. Erwin*, 438 F. 2d 929 (C.A. 6). There a non-taxpayer corporation sought an injunction requiring the Commissioner to lower his valuation of the estate of a taxpayer shareholder. The valuation would not affect the non-taxpayer's future federal tax liabilities, as the court of appeals here stated (R. 37); rather, it would affect only the non-taxpayer's future *state* tax liabilities. Nonetheless, the Sixth Circuit held that the federal Anti-Injunction Act was applicable because of the restraint on assessment of the estate taxes. If the possible effect of the suit on the non-taxpayer complainant's *future* tax liabilities

a vague standard would impose an undesirable burden not only on the courts but also to an even greater extent on the Internal Revenue Service, whose unimpeded ability to collect taxes is the primary purpose of the Anti-Injunction Act.

The adverse effect of reading this vague test into the prohibition on injunctions set forth in that Act would be heightened by the vagaries of the injunction process itself. A final injunction is often virtually perpetual in effect; a change in the applicable law or facts would often require reapplication to the court and further litigation in order to modify the injunction. Cf. *United States v. Swift & Co.*, 286 U.S. 106. The continuing supervision necessary to assure modification of the injunctive order, when appropriate, and to keep posted on the latest applicable injunctive orders would be especially burdensome in situations such as that present here, where revenue officials are continually auditing and processing returns of contributors to the organization claiming exempt status. In addition, where assurance of deductibility of contributions is in issue, organizations would be prompted to seek injunctive relief in the hope of obtaining a preliminary injunction and reaping the benefits of the interim assurance of deductibility of contribu-

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had to be measured, of course, suits such as that here would impose an even greater burden on the courts and the Service. Cf. *J.C. Penny Co. v. United States Treasury Dept.*, 439 F.2d 63, 68-69 (C.A. 2), affirming 319 F. Supp. 1023 (S.D. N.Y.), certiorari denied, 404 U.S. 869.

tions, even if they should eventually lose on the merits.<sup>16</sup>

The vague exception to the injunction prohibition adopted by the court of appeals would have even more disruptive effects if applied outside the exempt organizations area. In many types of situations a certain selectivity in issuing rulings is necessary in order to utilize best the limited resources of the Internal Revenue Service. See Littleton, *Practical Effects of New Procedures for Obtaining Rulings—An Insider's Viewpoint*, 1970 Tulane Tax Institute 289; Smith, *Tax Rulings—Their Use and Abuse*, 1970 So. Calif. Tax Institute 663; Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, 20 N.Y.U. Institute on Federal Taxation 1, 7-10 (1962). In numerous instances, the Treasury is asked to rule by persons whose taxes

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<sup>16</sup> In *Bob Jones University v. Connally*, *supra*, numerous donations were solicited and apparently obtained by the complainant on the strength of a preliminary injunction which was reversed on appeal. Indeed, the complainant there, through requests for stays and further proceedings in the district court, has continued its efforts to retain the benefits of the preliminary injunction even after the court of appeals decisions. Proceedings of this nature are far more burdensome to the government than a Tax Court or refund suit. Litigation of the *Bob Jones* injunction suit has necessitated virtually continual co-ordination among the Justice Department and the National and Regional Offices of the Internal Revenue Service in order to ensure compliance with the preliminary injunction and to avoid any action which would place officials in contempt of court.



are not directly in controversy.<sup>17</sup> These cases would presumably come within the exception to the injunction prohibition established by the court of appeals. The United States is presently the only nation in the world which issues advance rulings on the tax effects of prospective transactions. Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles, supra*, at 1. Congress has decreed that persons whose own tax burdens are adversely affected may obtain judicial review through

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<sup>17</sup> Examples of these situations include requests by governmental units respecting the tax exempt character of interest on their bonds under Code Section 103; requests by corporations respecting the manner in which they should compute their earnings and profits for purposes of characterizing distributions to stockholders; and requests by governmental units and other tax exempt organizations respecting the qualification of their pension trusts under Code Sections 401-404. Another example is a request by an acquiring corporation for a ruling that a stock-for-stock exchange qualifies as a Section 368(a)(1)(B) reorganization. (The acquiring corporation will ordinarily recognize no gain whether or not the transaction is classified as a reorganization under Section 368(a)(1)(B). See Section 1032. Indeed, the corporation's own taxes may be reduced by failure to qualify the transaction as a "B" reorganization, since in that event it would obtain a stepped-up basis for the acquired stock. See Section 362(b). Acquiring corporations frequently request "B" reorganization rulings in order to ensure that the shareholders of the acquired corporation will not recognize gain on the transaction and that they will thus agree to the exchange. See Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles, supra*, at 23-24.) See also, *In re Wingreen Co.*, 412 F. 2d 1048, 1050 (C.A. 5). In all of these situations, the issuance or non-issuance of the ruling will often have no beneficial effect on the tax liabilities of the requesting party.

statutory proceedings. If the content or nonissuance of advance rulings should become the subject of injunctive suits by diversely affected citizens, the discretion necessary to administer an efficient rulings program would be seriously impaired.

Nor would the deleterious effect of the court of appeals' decision on tax administration be confined to the area of tax rulings. Nothing in the opinion of the court of appeals requires that the primary purpose or collateral effect test should be limited to the ruling segment of the assessment and collection activities of the Internal Revenue Service. The Service's assessment and collection activities have adverse "collateral" effects on numerous groups and individuals whose taxes are not in issue in the proceedings. For example, imposition of a greater tax on a corporation may mean smaller dividends to the shareholders; imposition of a tax on a supplier may require an increase in the supplier's prices and place its customers at a competitive disadvantage; increases in taxes of manufacturers increase prices to consumers. It would be virtually impossible to estimate the number of administrative actions by the Internal Revenue Service which cause collateral detriment to other groups of individuals. If only a small proportion of these administrative actions could be subjected to judicial review on the complainant's showing that he was *collaterally* injured but was not *primarily* concerned with his own tax liabilities, the



disruption of the assessment and collection process would be overwhelming.<sup>18</sup>

<sup>18</sup> The court of appeals appears to have recognized (R. 37) a long series of decisions of this Court holding that a shareholder cannot enjoin his corporation from paying a tax (under a procedure which is now obsolete, see *Allen v. Shelton*, 96 F. 2d 102, 103 (C.A. 5)) unless the Treasury has waived the Anti-Injunction Act. *E.g.*, *Helvering v. Davis*, 301 U.S. 619, 639-640; *Sunshine Coal Co. v. Adkins*, 310 U.S. 381; *Hill v. Wallace*, 259 U.S. 44, 62-63; *Flint v. Stone Tracy Co.*, 220 U.S. 107; *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 554. The court dismissed these cases, however, on the ground that "In those situations \* \* \* a non-taxpayer sue[d] in the stead of the taxpayer \* \* \*." It is true that in one of the cases cited by the court of appeals, *Corbus v. Gold Mining Co.*, 187 U.S. 455, the suit was dismissed because the shareholder was suing in the stead of the corporation and there was no real controversy between the shareholder and the corporation. But that case merely emphasized this Court's requirement that the controversy between the shareholder and the corporation must be genuine before any type of suit is allowed, and that there must exist a real controversy between the complainant shareholder and the corporation; yet the shareholder in that case was allowed to join Treasury officials as defendants only because the Executive waived the benefit of the Anti-Injunction Act.

The rationale for the government's occasional waiver of the benefit of the Anti-Injunction Act was summarized at page 31 of the government's brief in this Court in *Helvering v. Davis* (No. 910, Oct. Term, 1936), *supra*:

We agree that Sec. R.S. 3224 [the predecessor of Code Section 7421] is intended to prevent equitable interference with the collection of Federal taxes by all devices, including the medium of a stockholder's suit in equity against a corporation to enjoin payment. However, we believe that this objection may be waived by an appropriate officer of the United States. \* \* \* We believe that such waiver is certainly within the power of the appropriate officers of the Government in a case like the present. Section 3224 was enacted to promote, not to discourage, the

Respondents' reliance on this Court's decisions in *Hill v. Wallace*, *supra*,<sup>19</sup> *Allen v. Regents*, *supra*, and *Miller v. Nut Margarine Co.*, *supra*, is misplaced. All of those cases involved applications of the "special and extraordinary facts and circumstances" test, first enunciated in *Dodge v. Osborn*, 240 U.S. 118, 122. Yet the confusion over the interpretation of that standard was the precise reason given by this Court for hearing and deciding the *Williams Packing* case (see 370 U.S. at 2-3 and n. 1), and it is clear that the *Williams Packing* standard was intended as a substitute rather than as an additional test for determining the applicability of the Anti-Injunction Act.<sup>20</sup>

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orderly administration and collection of Government revenues. Where, in the judgment of the appropriate officers, the litigation of an injunction suit is more important for the protection of the revenues than insistence upon adherence to the ordinary procedure of payment followed by a suit for refund, the officers should be permitted to waive the objections which Section 3224 authorizes them to raise.

<sup>19</sup> In *Hill v. Wallace*, members of the Chicago Board of Trade had brought a type of shareholder derivative suit against the Board in order to test the constitutionality of a statute taxing grain futures transactions. Since the Court was likely to give an opinion on the constitutionality of the statute regardless of whether the Commissioner of Internal Revenue could be joined, the Solicitor General appears implicitly to have waived the benefit of the Anti-Injunction Act and argued the substantive issue of the constitutionality of the statute. See 259 U.S. at 62-63.

<sup>20</sup> The taxpayers in *Bob Jones University* and *Crenshaw*, *supra*, argued that these earlier Supreme Court cases had enunciated exceptions to the Anti-Injunction Act which were

Respondents and the court of appeals also relied heavily on *Green v. Kennedy*, 309 F. Supp. 1127 (D. D.C.) (preliminary injunction), on final injunction *sub. nom. Green v. Connally*, 330 F. Supp. 1150 (D. D.C.), affirmed *per curiam* on intervenor appeal *sub nom. Coit v. Green*, 404 U.S. 997; and *McGlotten v. Connally*, 338 F. Supp. 448 (D. D.C.).<sup>21</sup> In *Green*, a class of Negro parents and children sought an injunction preventing Treasury officials from recognizing the right of white private segregated schools to tax deductible contributions under Code Section 170 (c) (2) and tax exempt status under Section 501(c) (3). The three-judge court issued the injunction, and the Treasury officials did not appeal since during the litigation they had voluntarily changed their legal position and had determined not to allow those tax benefits to the segregated schools.<sup>22</sup> In *McGlotten*, a black applicant to an Elks Club sued to require Treasury officials to withdraw tax exempt status under Code Sections 501(c) (7) and (8) from all fraternal

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in addition to that set forth in *Williams Packing*. The Fourth and the Fifth Circuits implicitly rejected those contentions, holding that *Williams Packing* controlled.

<sup>21</sup> The opinion in *McGlotten* was issued on the government's motion to dismiss. A final opinion on the merits has not yet been issued.

<sup>22</sup> In these circumstances, the memorandum affirmance of this Court on the appeal of the intervenor—parents of white children attending the segregated private schools—is not controlling authority on the jurisdictional issue. See Note, *Summary Disposition of Supreme Court Appeals: The Significance of a Limited Discretion and a Theory of Limited Precedent*, 52 B.U. L. Rev. 373, 424 (1972).

organizations and private clubs which would not admit blacks to membership. The court held (338 F. Supp. at 453-454) that the Anti-Injunction and Declaratory Judgment Acts had no application since the complainant was not seeking to restrain the assessment or collection of his own taxes.

The court of appeals below relied on these cases in support of the proposition that the Anti-Injunction and Declaratory Judgment Acts do not apply where the injunction does not seek a direct restraint on assessment or collection. This case thus adds to a growing line of injunction decisions, many of which have been brought by citizens with diverse non-tax interests, which presently threaten to shackle the administrative discretion of the Secretary of the Treasury and the Commissioner of Internal Revenue over the assessment and collection process. Several cases now pending seek declaratory judgments and injunctions to the effect that the complainant organization is exempt from tax under Section 501(c)(3) and eligible for tax deductible contributions under Section 170(c)(2). *E.g.*, *Center on Corporate Responsibility, Inc. v. Shultz*, 73-2 U.S.T.C., par. 9517 (D.D.C.), remanded for further proceedings, 73-2 U.S.T.C., par. 9518 (C.A.D.C.); *Tax Analysts and Advocates v. Shultz* (D. D.C., No. 833-73); *United States Servicemen's Fund v. Shultz* (D. D.C., No. 780-73). Still other suits seek declaratory judgments requiring the Treasury officials to withdraw various tax benefits from other taxpayers. *E.g.*, *Eastern Kentucky Welfare Rights Organization v. Shultz* (D. D.C., No. 1378-71) (suit to withdraw tax exemption ruling of

certain hospitals); *Marker v. Connally*, 29 A.F.T.R. 2d 798 (D. D.C.), affirmed on non-jurisdictional grounds, No. 72-1499 (C.A.D.C.), decided August 8, 1973 (suit to take away tax exemptions of certain unions); *Alexander v. N.F.O.* (W.D. Mo., No. CA 1919-71) (suit to take away exemption of competitor); *Common Cause v. Connally* (D. D.C., No. 1337-71) (suit to enjoin promulgation of liberalized depreciation regulations);<sup>23</sup> *McCoy v. Shultz*, 73-1 U.S. T.C., par. 9233 (D. D.C.) (suit to withdraw tax exemption from social clubs which discriminate against women).

Both the court of appeals (R. 38) and respondents (Resp. to Pet. 6) discounted the notion that the approach they take will open the "floodgates" to judicial interference with the tax rulings system in particular, and the tax assessment and collection system in general. We submit that the decision below, unless reversed, is likely to lead to an intrusion of the judiciary into the tax assessment system on a scale approaching that which led to the passage of the tax exception to the Declaratory Judgment Act in 1935. See Borchard, *Declaratory Judgments* (1941 ed.) 851-854. Indeed, the broad type of judicial review which respondents ask this Court to sanction is even more threatening to the aims of the Anti-Injunction and Declaratory Judgment Acts than are actions by taxpayers respecting their own tax liabilities. Tax assessment and collection are impeded not solely by injunctions forbidding assessment or collection of the

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<sup>23</sup> The suit was dismissed by agreement of the parties.

complainant's taxes for a particular year. Even greater interference is caused by injunctions, such as that here, which seek to alter a ruling affecting both the complainant and numerous contributors and which require the Treasury Department to devote its personnel and other resources to collecting taxes against one group with a consequent diminution of resources available for collection against other more fruitful sources of revenue. See *Moore v. Miller*, 5 App. D.C. 413, 419, appeal dismissed, 163 U.S. 696; *Louisiana v. McAdoo*, *supra*.

(iii) The court of appeals borrowed the first part of the *Williams Packing* test—the requirement that the complainant show the absence of a legal remedy for which there is no adequate remedy at law—as the third part of its new exception to the injunction prohibitions. We do not quarrel with the relevance of this factor. We do, however, challenge the unduly narrow approach which led the court of appeals to conclude that the test had been satisfied.

There were at least two fully adequate legal means by which respondent could have litigated its eligibility for tax deductible contributions. First, respondent itself could have filed a claim for refund with its payment of \$981.13 in F.U.T.A. taxes in February 1970. Even if the Commissioner of Internal Revenue had failed to take any action on the claim, respondent could have brought a suit for refund as early as August 1970, in which its Section 501

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<sup>24</sup> Of course, if the Commissioner had acted more quickly and denied the claim, respondent could have brought an action sooner. Code Section 6532(a).



(c) (3) tax exemption, and its consequent eligibility for tax deductible contributions, could have been litigated. See Code Section 6532(a).<sup>24</sup> If this procedure had been followed, it is likely that respondent would by now have advanced closer to securing resolution of the substantive question of its right to receive tax deductible contributions than it has through the instant litigation.<sup>25</sup>

It is difficult to understand on what basis the court of appeals could have stated (R. 36, n. 13) that "the unemployment tax refund litigation \* \* \* is subject to certain conditions and, we feel, is so far removed from the mainstream of the action and relief sought as to hardly be considered adequate." The opinion gives no indication of the character of the "conditions" to which it refers, and we can think of none. Nor can we understand why F.U.T.A. litigation is "far removed from the mainstream of the action." Liability for payment of F.U.T.A. taxes is one of the direct tax results of revocation of a Section 501(c)

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<sup>25</sup> We note that the Executive has authority to make administrative refunds of tax payments and thus to moot a lawsuit. This does not, however, pose a real threat to the adequacy of an exempt organization's legal remedy for obtaining review of withdrawal of the deductibility assurance ruling. If the refund suit involved the peculiar facts of a prior year—such as inurement of personal benefits to an officer—the lawsuit would not be dispositive of the organization's present right to a ruling in any event. Administrative refunds might be granted in these circumstances due to inadequate proof, expense of litigation, or other litigation reasons. Where, as here, the issue is purely legal and may be dispositive for future years, an administrative refund would constitute bad faith on the part of Treasury officials, which should not be presumed.

(3) tax exemption ruling. The suit for refund of taxes related to employment has recently been used as a vehicle for litigating liability for taxes as a result of revocation of a tax exemption ruling. *Christian Echoes Nat. Ministry, Inc. v. United States*, 28 A.F.T.R. 2d 5934 (N.D. Okla.), appeal dismissed on jurisdictional grounds, 404 U.S. 561, district court reversed, 31 A.F.T.R. 2d 460 (C.A. 10), petition for writ of certiorari pending, No. 72-1378. Indeed, *Williams Packing* itself was a suit relating to employment taxes.

Apart from the refund suit for unemployment taxes, there is an adequate remedy at law for redress of the respondent's injury stemming from the ruling that donations to respondent will hereafter not be considered deductible. It would be a simple matter for the respondent to enlist the aid of an officer, employee, or other friendly party to make a small donation, and then test his right to a deduction in a Tax Court or refund suit.<sup>26</sup> It is true that this procedure is formally somewhat indirect; yet such a suit is no less simple or effective on that account, and we submit that it is far preferable to subjecting the tax rulings system to the equity supervision of the federal courts.

The only irreparable injury which the respondent might sustain is the possible decrease in contributions during the period in which its tax exempt status is being litigated. This type of injury, however, is an inevitable consequence of the fact that the dispute

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<sup>26</sup> The Second Circuit referred to this alternative in *Jolles Foundation v. Moysey*, 250 F. 2d 166.



between respondent and the government with respect to respondent's exempt status cannot be instantly resolved; the potential loss of contributions could only be avoided if respondent had the right to an immediate preliminary injunction which would render all contributions deductible throughout the period of litigation. It seems highly unlikely that Congress intended to allow exempt organizations automatically to retain their exempt status and the assurance of deductible contributions throughout the pendency of the law suits in which their status is litigated, regardless of the merits of their claims or the outcome of the litigation. See n. 16, *supra*. To the contrary, the language of the Anti-Injunction and Declaratory Judgment Acts and the historical development of the Congressional scheme governing administration of the tax laws strongly suggest that Congress concluded that the injury which taxpayers may suffer while pursuing the normal channels of litigation do not justify injunctive intrusion into the collection of the revenue. Indeed, this Court specifically held in *Williams Packing* that even if a claimant can show that it has sustained or will sustain irreparable damage for which there is no adequate remedy at law, it cannot obtain an injunction unless it can also show (370 U.S. at 7) that "under no circumstances could the Government prevail."

**B. The suit is barred by the tax exception to the Declaratory Judgment Act**

The Declaratory Judgment Act, 28 U.S.C. 2201 and 2202, Appendix, *infra*, p. 63, bars any declaratory suit "with respect to Federal taxes." Section

2202 expands this prohibition by providing that the statute applies to any "[f]urther necessary or proper relief based on a declaratory judgment or decree \* \* \*." The latter provision encompasses injunctions in aid of the declaration of rights, as well as the declaration itself. S. Rep. No. 1005, 73d Cong., 2d Sess. 6. Since the present case seeks a declaration as to the future tax liabilities of both respondent and its contributors, together with an injunction in support of the declaration, it is barred by the express terms of the tax exception to the Declaratory Judgment Act, regardless of the application of the Anti-Injunction Act.

The court of appeals refused to give the Declaratory Judgment Act any significance independent of the Anti-Injunction Act, reasoning that the two statutes were coterminous in scope. (R. 29-30.) This position fails to give meaning to the words of the statute and its legislative history, and departs from or misreads the applicable precedents.

The tax exception to the Declaratory Judgment Act was placed in the statute about one year after its original enactment.<sup>27</sup> It was inserted in response to a flood of suits declaring the "processing" taxes unconstitutional or inapplicable. See Borchard, *Declaratory Judgments* (1941 ed.) 850-857. The Senate Report on the prohibitory amendment noted that these cases represented a departure from precedents under the Anti-Injunction Act, and that it was neces-

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<sup>27</sup> The amendment was contained in Section 405 of the Revenue Act of 1935, c. 829, 49 Stat. 1014.

sary to preserve tax "determination[s]," as well as assessments and collections, free of judicial interference apart from the statutory review system (S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1939-1 Cum. Bull. (Part 2) 651, 657)):

Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has *no application to Federal taxes*. The application of the Declaratory Judgments Act to taxes would constitute a *radical departure* from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that *the orderly and prompt determination and collection of Federal taxes should not be interfered with* by a procedure designed to facilitate the settlement of private controversies, and that *existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors*. [Emphasis added.]

Thus, even if it is assumed, *arguendo*, that the "assessment and collection" phrase of the Anti-Injunction Act does not encompass the alleged "non-taxpayer" complainant's attempt here to obtain a judicial declaration as to the tax liabilities of its contributors, nonetheless, this case is plainly within the broader statutory phrase " 'with respect to Federal taxes,' " and concerns the "determination" of federal taxes. See Bittker and Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 Yale L.J. 51, 58 (1972); Borchard, *supra*, at 855-857.

The decisions of the lower federal courts have applied the Declaratory Judgment Act prohibition to non-taxpayer suits respecting federal taxes in circumstances virtually identical to those present here. In *Liberty Amendment Committee of the U.S.A. v. United States* (No. 70-721-HP, C.D. Cal.), affirmed *per curiam* (No. 26,507, C.A. 9), certiorari denied, 409 U.S. 1076,<sup>28</sup> the court held that the Declaratory Judgment Act barred an organization exempt from tax under Section 501(c)(4) from obtaining injunctive relief requiring the Treasury Department to issue a ruling recognizing its eligibility for tax deductible contributions under Section 170(c)(2) and tax-exempt status under Section 501(c)(3). *Jolles Foundation v. Moysey*, *supra*, involved a similar situation, with the exception that the complainant organization sought no Section 501(c)(4) ruling, since it had "no income upon which a tax might be laid."<sup>29</sup>

In holding (R. 30) that the tax exception to the Declaratory Judgment Act was "coterminous" with the Anti-Injunction Act, the court of appeals relied on a line of cases beginning with *Tomlinson v. Smith*, 128 F. 2d 808, 811 (C.A. 7), and followed most recently in *McGlotten v. Connally*, 338 F. Supp. 448, 453 (D. D.C.). The *Tomlinson* case and most of its progeny actually support a contrary conclusion. In *Tomlinson*, a non-taxpayer third party—a trustee

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<sup>28</sup> The opinions of the lower courts in *Liberty Amendment Committee* are printed as Appendix E to the petition in the instant case.

<sup>29</sup> Brief for the Appellant, p. 16, *Jolles Foundation v. Moysey*, *supra*.

of partnership property—sought injunctive and declaratory relief preventing the Commissioner from levying on partnership property to satisfy the tax liability of another taxpayer, *i.e.*, the complainant in his capacity as an individual partner. The court initially held that the Anti-Injunction and Declaratory Judgment Acts were “co-extensive” in the sense that they did not prohibit suits by non-taxpayers to enjoin levies on their property to satisfy the tax liabilities of other taxpayers. That holding is now codified in Section 7426 of the Internal Revenue Code. The court went on to hold, however, that the non-taxpayer complainant’s attempt to obtain a declaration as to the tax liability of the taxpayer was barred by the tax exception to the Declaratory Judgment Act. The same distinction was made in *Bullock v. Latham*, 306 F. 2d 45 (C.A. 2), on which the court of appeals below relied (R. 30), and in *Jules Hairstylists of Maryland v. United States*, 268 F. Supp. 511, 515 (D. Md.), affirmed *per curiam*, 389 F. 2d 389 (C.A. 4), certiorari denied, 391 U.S. 934, upon which the *McGlotten* opinion (338 F. Supp. at 453, n. 23) relied.

The court of appeals viewed the instant case as a suit by a non-taxpayer seeking a declaration as to the tax liabilities of other taxpayers, *i.e.*, its contributors; since the instant suit could not be viewed as a suit regarding a non-taxpayer’s property taken to satisfy a taxpayer’s liability, the *Tomlinson*, *Bullock* and *Jules Hairstylists* cases directly support the government’s position. Other cases barring suits by non-taxpayers respecting the tax liabilities of other

taxpayers on the basis of the Declaratory Judgment Act include: *Singleton v. Mathis*, 284 F. 2d 616 (C.A. 8) (suit by gambling machine lessor respecting tax liability of lessee); *Mitchell v. Riddell*, 402 F. 2d 842 (C.A. 9), appeal dismissed and certiorari denied, 394 U.S. 456 (suit by trust grantor respecting exemption of trust from income taxes); *West Chester Feed & Supply Co. v. Erwin*, *supra*; *In re Wingreen*, *supra* (suit by bankruptcy trustee respecting tax liability of the bankrupt).

**C. This action constitutes an uncontested suit against the United States and is barred by sovereign immunity**

Respondent's complaint should have been dismissed for lack of jurisdiction for another separate reason. Though the named defendant in this action is the Commissioner of Internal Revenue, it is, in fact, a suit against the United States to which no consent has been given. In order to understand the full implications of the sovereign immunity rationale in the context of this case, a brief historical analysis may be helpful.

The focal point of this lawsuit is the action of the Commissioner of Internal Revenue in first issuing, and then withdrawing, an advance ruling recognizing respondent's eligibility for tax deductible contributions and exemption from unemployment taxes. The authority of Treasury Department officials to issue these rulings has roots deep in this country's history. The First Congress delegated to the Treasury Department the duty of "superintend[ing] the collection of the revenue \* \* \*." Act of September



2, 1789, c. 12, 1 Stat. 65; see currently 31 U.S.C. 1002.<sup>30</sup> At least as early as 1792, Secretary Hamilton was addressing to Collectors the first rulings, called "circulars," informing them of the "true construction" of the revenue acts.<sup>31</sup>

There is no record that any ruling was ever challenged in the courts during the nineteenth century. Indeed, in the earliest days of the Republic taxpayers were allowed little judicial review of *any* actions of revenue officials in assessing and collecting taxes. In

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<sup>30</sup> Perhaps to resolve doubts and conflicts concerning the authority of the Treasury Secretary, the Act of May 8, 1792, c. 37, 1 Stat. 279, Section 6, provided that "the Secretary of the Treasury shall direct the superintendence of the collection of the duties on impost and tonnage as he shall judge best."

<sup>31</sup> See Circular of August 27, 1792, reproduced in *The Work and Jurisdiction of the Bureau of Internal Revenue*, GPO (1948), p. 9:

A difference of opinion between the Collectors and Supervisors has occurred in regard to the seventh section of the Act "concerning the Duties on Spirits distilled within the United States, etc." The true construction is, that the abatement of two percent for leakage, is to be made, on securing the Duty at the end of the quarter from the whole quantity distilled during the preceding three months—and hence it will be necessary that in cases of exportation, the drawbacks on Distilled Spirits be adjusted with an eye to this allowance.

A doubt has arisen on the 35th, or more properly the 36th Section of the Collection Law, whether molasses is to be considered within the meaning of that Section. I am of opinion, it is, and that the allowance of two percent for leakage ought to be extended to that article.

1836, this Court held that a taxpayer might bring an action in the nature of assumpsit against an individual collector for a refund of taxes erroneously collected. *Elliott v. Swartwout*, 10 Pet. 137. In 1838, however, Congress enacted legislation providing that all taxes paid to Collectors under protest should be remitted promptly to the Treasury without awaiting the result of any litigation. Act of March 3, 1839, c. 82, 5 Stat. 339, Sec. 2. In *Cary v. Curtis*, 3 How. 236, 244, this Court noted the government's immunity from suit as a prime factor in holding that the Act of March 3, 1839, had effectively prohibited all assumpsit suits for refund against Collectors.<sup>32</sup>

Even after Congress provided by statute for refund suits against Collectors (*e.g.*, Act of February 26, 1845, c. 22, 5 Stat. 727), the courts were extremely strict in requiring exact adherence to the statutory system for bringing these suits, and in barring non-complainant litigants on sovereign immunity grounds. For example, in *Nichols v. United States*, 7 Wall. 122, 126, the Court held that a taxpayer who had failed to make the required formal protest to the Treasury was barred by sovereign immunity from

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<sup>32</sup> The only remaining procedure by which a taxpayer could obtain judicial review of an alleged overassessment was to post a bond for payment and then litigate liability for the taxes when the government brought suit on the bond. See *Cary v. Curtis*, *supra*, 3 How. at 243; Brief for the Collector in *Elliott v. Swartwout*, 10 Pet. 137, summarized at *id.*, p. 146; *Ex parte Davenport*, 6 Pet. 661; *United States v. Phelps*, 8 Pet. 700. These suits were the predecessor of the modern collection suit, in which liability for the tax may be challenged by the taxpayer. *E.g.*, *United States v. O'Connor*, *supra*.



seeking a tax refund in a Court of Claims action.<sup>33</sup> It was not until the Act of July 30, 1954, c. 648, 68 Stat. 589, that taxpayers were allowed to bring suits against the United States for refund in the district courts without limitation as to amount involved and with full right of jury trial. See H. Rep. No. 659, 83d Cong., 1st Sess.; H. Conf. Rep. No. 2276, 83d Cong., 2d Sess. (2 U.S.C. Cong. & Adm. News (1954) 2716-2721); see generally, Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 684 (1947). In addition, Congress has given its consent to taxpayers' suits in the Tax Court for the adjustment of disputes respecting the amounts of deficiencies in proposed tax assessments. Section 274 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 297; see, currently, Sections 6212 and 6213 of the Code. Apart from these procedures, and with the exception of Section 7426 which is not relevant here, Congress has not given either taxpayers or non-taxpayers consent to sue with respect to the actions of the Internal Revenue Service in assessing or collecting taxes.

The court of appeals below held that this long-standing sovereign immunity rule was inapplicable here, since the respondents contend that the Commissioner is acting in violation of the Constitution and in excess of his statutory authority. But the fact that a case alleges violations of constitutional rights

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<sup>33</sup> Cf. *Savings Institution v. Blair*, 116 U.S. 200, 205-206; *Smietanka v. Indiana Steel Co.*, 257 U.S. 1; *Lowe Bros. Co. v. United States*, 304 U.S. 302, 306; *United States v. Garbutt Oil Co.*, 302 U.S. 528, 533-535.

does not necessarily except it from the sovereign immunity bar. In *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 691, n. 11, this Court held that suits requiring affirmative action by the sovereign, rather than merely an order requiring the cessation of the conduct complained of, may be barred by sovereign immunity, regardless of the allegations of constitutional violations. The Court cited *North Carolina v. Temple*, 134 U.S. 22, in which it was held that sovereign immunity barred a citizen from bringing suit against the financial officer of a state and other officials, to order them to collect, and cease interference with the collection of, a state tax. The complainants there had alleged that the state officials' action in not collecting the tax violated their rights under the Contract Clause and the Fourteenth Amendment to the Constitution.

In the instant case, respondents request the district court, *inter alia*, to require the Commissioner to reinstate "Americans United" on the "Cumulative List of Organizations described in Sec. 170(c) of the \* \* \* Code \* \* \*"; to enjoin the Commissioner from applying Sections 170 and 501 "so as to deprive the individual plaintiffs \* \* \* of the benefit of tax advantages \* \* \*"; and (in the alternative) to require the Commissioner "to reopen its revocation proceedings against the corporate plaintiff \* \* \* and reevaluate \* \* \* [its] status as a Section 501(c)(3) charitable corporation." (R. 16.) This broad affirmative relief is precluded by the government's immunity as sovereign from suit.

The court of appeals also noted that the sovereign immunity bar does not apply where the officers' actions are beyond their statutory powers. But respondents have never questioned the authority of the Commissioner to issue rulings to private organizations regarding their tax exempt status. That power is plainly vested in the Commissioner by Section 7805 (a) of the Code, which empowers him to "prescribe all needful rules . . . for the enforcement of" the revenue laws. See generally, *Automobile Club v. Commissioner*, 353 U.S. 180. Moreover, Congress has provided in Section 7801 of the Internal Revenue Code that "the administration and enforcement of \* \* \* [the revenue laws] shall be performed by or under the supervision of the Secretary of the Treasury."<sup>34</sup> See generally, *The Work and Jurisdiction of the Bureau of Internal Revenue*, GPO (1948). Accordingly, this case falls within the rule that an executive official's performance of a statutory duty to interpret the law, even if the interpretation is erroneous, is an action of the sovereign which the courts may not enjoin. *Larson v. Domestic & Foreign Corp.*, *supra*, 337 U.S. at 690; *Dugan v. Rank*, 372 U.S. 609, 621-622; see *Hawaii v. Gordon*, 373 U.S. 57.

This Court has recognized the immunity of Treasury officials from suit outside the prescribed statutory channels with respect to their interpretations of the federal tax statutes. In *Louisiana v. McAdoo*,

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<sup>34</sup> These grants of authority can be traced back to the statutes of the First and Second Congresses discussed *supra*, pp. 42-43.

234 U.S. 627, the Court held that a suit to declare illegal the Treasury's interpretation of a tax statute must be dismissed on sovereign immunity grounds, even though the peculiar circumstances would have made it impossible for the complainant to obtain judicial review by means of a refund suit or through other procedures. The Court expressed particular concern at the fact that there, as here, the suit was brought by a complainant whose principal interest was other than his own tax liabilities (234 U.S. at 632):

Obviously such suits to review the official action of the Secretary of the Treasury in the exercise of his judgment as to the rate which should be exacted under his construction of the \* \* \* [taxing statute] would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom. Such suits would obviously, in effect, be suits against the United States. \* \* \*

See also *United States v. Correll*, 389 U.S. 299, 306-307; *Bingler v. Johnson*, 394 U.S. 741, 750-751; *Wolkstein v. Port of New York Authority*, 178 F. Supp. 209 (D. N.J.); *In re Wingreen*, *supra*.

Viewed from an historical perspective, the purpose and effect of both the sovereign immunity principle and the Anti-Injunction and Declaratory Judgment Acts are to prevent the type of disturbance of the revenue system and the revenues to which the Court referred in *McAdoo*. Together, sovereign immunity and the statutory proscriptions serve to restrict judi-

cial review of revenue administration to the statutory system composed of refund and Tax Court actions.<sup>35</sup> The decision of the court below would open up many revenue administrative acts to judicial review of a wholly different character. Such an extension of judicial review in the vital area of collection of the nation's revenue should be left to Congress rather than the courts.

## II

### RESPONDENTS HAVE NOT PRESENTED A SUBSTANTIAL CONSTITUTIONAL QUESTION JUSTIFYING THE CONVENING OF A THREE-JUDGE COURT

If this Court should decide any of the jurisdictional issues in the petitioner's favor, there is no need to consider the question whether a three-judge court should be convened. It is undisputed that if the district court had no jurisdiction to hear the case, there was no justification for convening a three-judge court regardless of the substantiality of the constitutional question presented. *E.g.*, *Ex parte Poresky*, 290 U.S. 30, 31; *Bailey v. Patterson*, 369 U.S. 31, 33; *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715. Even if the court had jurisdiction to entertain the

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<sup>35</sup> A similar statutory system has been established with respect to import taxes. The courts have barred injunctive suits outside that system under the Anti-Injunction Act. *E.g.*, *J. C. Penney Co. v. United States Treasury Dept.*, 439 F. 2d 63 (C.A. 2), affirming *per curiam*, 319 F. Supp. 1023 (S.D. N.Y.), certiorari denied, 404 U.S. 869; *Cottman Co. v. Dailey*, 94 F. 2d 85 (C.A. 4).

suit, however, we submit that the constitutional questions presented by respondents' complaint are insubstantial and do not justify the convening of a three-judge court.<sup>36</sup>

Sections 170(c)(2) and 501(c)(3) prevent an organization from qualifying for their benefits if a "substantial part" of the organization's activities "is carrying on propaganda, or otherwise attempting, to influence legislation \* \* \*." This lobbying proscription is basically quantitative rather than qualitative in character. Note, *Tax Treatment of Lobbying Expenses and Contributions*, 67 Harv. L. Rev. 1408, 1412 (1954); Note, *Income Taxes—Deductions: In General—Etc.*, 80 Harv. L. Rev. 1793, 1794 (1967); see *Kuper v. Commissioner*, 332 F. 2d 562 (C.A. 3). Basically, the substantiality tests requires weighing the amount of political activity against the nonpolitical activities of the organization. The test presents a factual question to be determined on the basis of the facts and circumstances of each case. *Seasongood v. Commissioner*, 227 F. 2d 907, 912 (C.A. 6).

The determination whether lobbying activities have been substantial in any particular case requires consideration of a number of factors, including the amounts of time and effort which are devoted to lobbying activities, and whether participation in those activities is by the leadership, members, or out-

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<sup>36</sup> The constitutionality of the statutory lobbying proscription and the Treasury Department's administration thereof is necessarily included in the Anti-Injunction and Declaratory Judgment Acts jurisdictional issue, and was not presented as a separate issue for review in the petition for certiorari.

siders;<sup>37</sup> the amount of money budgeted for political activities and the amount actually expended;<sup>38</sup> the number of programs and activities devoted to lobbying;<sup>39</sup> and whether the lobbying activities were sporadic, incidental or casual or, instead, regular, formal and purposeful.<sup>40</sup>

In the court of appeals, the respondents contended that the statutory lobbying proscription violates several constitutional rights. The court held that respondents' claim that the proscription is discriminatory in violation of the Due Process Clause of the Fifth Amendment merited some consideration—that the argument's "possibility of success is not so certain as to merit the \* \* \* [*Williams Packing*] excep-

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<sup>37</sup> Statement of Assistant Commissioner Norman A. Sugarman in Hearings Before the House Special Committee to Investigate Tax Exempt Foundations and Comparable Organizations, June 2, 1954, 83d Cong., 2d Sess. 423, 433-434; Lehrfield, *How Much Politicking Can a Charitable Organization Engage in?*, 29 J. Taxation 236 (1968).

<sup>38</sup> *Seasongood v. Commissioner*, *supra*; *Kuper v. Commissioner*, *supra*; *League of Women Voters of U.S. v. United States*, 180 F. Supp. 379 (Ct. Cl.); Caplin, *Limitations on Exempt Organizations: Political and Commercial Activities*, N.Y.U. Proceedings of the Eighth Biennial Conference on Charitable Foundations 265, 274.

<sup>39</sup> Statement of the Commissioner of Internal Revenue, Hearings on Treasury Department and Related Agencies Appropriations for 1968, Subcommittee of the House Committee on Appropriations, 90th Cong., 1st Sess. 536 (1967).

<sup>40</sup> Letter ruling addressed to the Sierra Club dated December 16, 1966, 1967 P-H Fed. Taxes, par. 54,664. See, also, *Liberty Nat. Bank & Trust Co. v. United States*, 122 F. Supp. 759 (W.D. Ky.).

tion with respect to \* \* \* [the Anti-Injunction Act], yet not so frivolous or foreclosed as to merit denial of the § 2282 motion [for convening of the three-judge court]." (R. 43.) The court reasoned that wealthy organizations are greater in size, and are thus able to engage in a larger absolute number of lobbying activities without overstepping the relative "substantial" limitation. According to the appellate court, this Court's then-unannounced decision in *San Antonio Independent School District v. Rodriguez*, decided March 21, 1973, No. 71-1332 "should prove most instructive in \* \* \* [this] area of concern \* \* \* —'discrimination' of this type as within the 'wealth' category, and the status of 'wealth' as giving rise to the compelling interest test." (R. 42.)

To begin with, respondents and the court of appeals have misconceived the nature of the substantiality test. The determination of whether lobbying constitutes a substantial portion of any organization's total activities is not based solely or even primarily on expenditures. As explained above, numerous other factors are taken into account in the context of the peculiar totality of activities and the operational framework of each organization. It is true that an organization generously endowed with funds might find it easier to meet the substantiality test in terms of expenditures. Yet such an organization might also find it more difficult to meet the substantiality test in terms of time or activities. This is not to suggest that all organizations will experience



equal difficulties in meeting the substantiality test—indeed there have been numerous complaints over the years that certain organizations have more difficulty meeting the test because of the character of their charitable or educational activities.<sup>41</sup> Nonetheless, we submit that the substantiality test is about as close as Congress could come to imposing a lobbying proscription which would weigh as equally as possible on all types of organizations. See Note, *supra*, 80 Harv. L. Rev. 1793, 1794; Note *Tax Treatment of Lobbying Expenses and Contributions*, 67 Harv. L. Rev. 1408, 1412.

Even assuming, however, that the statutory lobbying proscription in actual operation tends to disfavor relatively less wealthy organizations, it does not follow that the Fifth Amendment has been violated. This Court specifically disapproved a similar contention in *Rodriguez* that the school finance system there violated the Fifth Amendment because it tended to discriminate against relatively poorer individuals. Here, as in that case, respondents have not even attempted to show that the lobbying proscription “operates to the peculiar disadvantage of any class fairly

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<sup>41</sup> For example, an organization devoted to better mental health care and treatment might have more opportunities for lobbying than an organization devoted to the treatment and prevention of heart diseases: in our society, mental health has traditionally been the concern of government, while heart disease has principally been the subject of private action. Yet, under the statutory test, the mental health organization is allowed no more lobbying activities because of its character as such.

definable as indigent \* \* \*." Here, as in *Rodriguez*, the law may treat some people or organizations different from others, but it does not offend the Fifth Amendment by classifying in an arbitrary, capricious, or invidiously discriminatory manner. See the concurring opinion of Mr. Justice Stewart in *Rodriguez*. The statutory lobbying proscription thus creates no constitutionally "suspect" classification. Accordingly, under *Rodriguez* the appropriate Fifth Amendment test is whether the provision is within the wide latitude and discretion, including "considerations of policy and practical convenience," allowed to legislative bodies in framing tax statutes. See, e.g., *Steward Machine Co. v. Davis*, 301 U.S. 548, 584-585; *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 512-513.

The substantiality clause of Sections 170 and 501 (c) (3) meets this rationality standard, for as Judge Wilkey pointed out in his concurring opinion (R. 43-45), an absolute lobbying limitation would have created serious problems. If the limit were pegged to small organizations, the number of legislative appearances allowed to large organizations would have been inadequate to represent even their most fundamental interests. On the other hand, if the limit were pegged to large organizations, small groups would in effect be allowed to devote virtually all of their resources to lobbying. In these circumstances, the relative "substantiality" test marks a reasonable solution.<sup>42</sup>

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<sup>42</sup> In 1969, Congress made extensive efforts to place more exact and stringent standards on the political activities of tax

Respondents also argued below that the statutory lobbying proscriptions violated their rights of political action—speech, press, assembly and petition for redress of grievances—under the First Amendment. This contention was properly rejected by the court of appeals (R. 41) as having been disposed of in the unanimous opinion of this Court in *Cammarano v. United States*, 358 U.S. 498, 512-513. There the Court held that a similar lobbying proscription in another provision of the Internal Revenue Code <sup>43</sup> did not constitute infringement of First Amendment rights, stating (358 U.S. at 513):

Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums

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exempt organizations. The result of these efforts was the enactment of Code Sections 509 and 4945, which impose heavy tax burdens on political activities of certain tax exempt organizations. The legislative history of these statutes, together with the difficulties of legislating standards which are more definite and easier to administer, are discussed in Note, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 Geo. Wash. L. Rev. 1114, 1125-1136 (1970). There are presently pending in the 93d Congress at least two bills (H. R. 5095 and S. 1036) aimed at altering the substantiality test. See 78 Cong. Rec., Part 6, p. 5959.

<sup>43</sup> Section 23(a)(1) of the 1939 Code and Sections 29.23(o)-1 and 29.23(q)-1 of Treasury Regulations 111 (1939 Code).

expended to promote or defeat legislation is plainly not "aimed at the suppression of dangerous ideas."

Since the lobbying proscription here is similarly non-discriminatory, it does not impinge upon respondent's political action rights under the First Amendment. As Mr. Justice Douglas stated in his concurring addendum in *Cammarano* (358 U.S. at 515):

\* \* \* the view favored in some quarters that First Amendment rights must be protected by tax exemptions \* \* \* savors of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a notion runs counter to our decisions \* \* \* and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with [the] First Amendment \* \* \*.<sup>41</sup>

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<sup>41</sup> Respondents also contended below that the lobbying proscription in effect acts as an "establishment" of large religions which they oppose since those organizations are more wealthy and can undertake a greater absolute quantum of lobbying. This argument is actually a variation of the Due Process argument. Since the enactment and administration of the lobbying proscription are based on a wholly secular rationale, the argument is without merit. *Gillette v. United States*, 401 U.S. 437, 449, n. 14; see *Walz v. Tax Commission*, 397 U.S. 664.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1973.



## APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 170. CHARITABLE, ETC, CONTRIBUTIONS  
AND GIFTS.

\* \* \* \*

(c) [as amended by Sec. 201(a), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] *Charitable Contribution Defined*.—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

\* \* \* \*

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (includ-

ing the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

\* \* \*

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

\* \* \*

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

\* \* \*

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.



(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

\* \* \* \*

SEC. 3301 [as amended by Sec. 301(a), Employment Security Amendments of 1970, P.L. 91-373, 84 Stat. 695]. **RATE OF TAX.**

There is hereby imposed on every employer (as defined in section 3306 (a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306 (b)) paid by him during the calendar year with respect to employment (as defined in section 3306 (c)).

SEC. 3306. **DEFINITIONS.**

\* \* \* \*

(c) [as amended by Sec. 105(a), Employment Security Amendments of 1970, *supra*] *Employment.*—For purposes of this chapter, the term “employment” means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for

the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, \* \* \* except—

\* \* \* \*

(8) [as amended by Sec. 533, Social Security Amendments of 1960, P.L. 86-778, 74 Stat. 924] service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

\* \* \* \*

#### SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] *Tax*.—Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

\* \* \* \*

## 28 U.S.C.:

§ 2201 *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. *Further relief.*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.



No. 72-1371

Supreme Court, U. S.  
FILED

SEP 26

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1973

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DONALD C. ALEXANDER,  
COMMISSIONER OF INTERNAL REVENUE,  
*Petitioner,*

v.

"AMERICANS UNITED" INC., ETC., *ET AL.*,  
*Respondent.*

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On Writ of *Certiorari* to The United States  
Court of Appeals for The District of Columbia Circuit

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**BRIEF *AMICUS CURIAE* FOR TAX ANALYSTS AND  
ADVOCATES IN SUPPORT OF RESPONDENT**

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September, 1973

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IN THE  
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**BRIEF FOR TAX ANALYSTS AND ADVOCATES  
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT**

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**QUESTIONS DISCUSSED BY *AMICUS***

Unlike "Americans United" (respondent), *Amicus* has maintained its status under the Internal Revenue Code as a Section 501(c)(3) organization and its eligibility to receive deductible

contributions. *Amicus* has determined not to jeopardize this status and has refrained from all legislative activities. *Amicus* has initiated a suit, presently pending in Federal District Court, in which it seeks to have declared unconstitutional the restrictions on legislative activities of Section 501(c)(3) organizations and to have Treasury officials enjoined from continued enforcement of those restrictions. The questions discussed by *Amicus* are:

1. If this Court determines that an organization which has lost its Section 501(c)(3) status for having allegedly engaged in substantial legislative activities is barred from seeking declaratory or injunctive relief concerning the constitutionality of limitations on its legislative activities, should such a determination be circumscribed so as not to bar *Amicus*, which still maintains 501(c)(3) status, from litigating its suit since it is currently unable to cast its challenge in the form of a refund suit?

2. Is an organization currently classified under Section 501(c)(3) required to engage in substantial legislative activities and thereby jeopardize its current tax status to be able to challenge the restrictions on such activities?

Written consent has been obtained from counsel for each party for the filing of this brief *amicus curiae*. The letters containing these consents are on file with the Clerk of this Court.

#### I. INTEREST OF *AMICUS CURIAE*

Tax Analysts and Advocates (TA/A) was incorporated on July 14, 1970, under the District of Columbia Non-Profit Corporation Act. Its organizational purposes are to improve public understanding of the Federal tax system,



and to improve the administration of the tax laws by conducting a public interest tax law practice. On March 23, 1971, the Internal Revenue Service ruled that TA/A was exempt from income tax as an organization within the scope of Section 501(c)(3) of the Internal Revenue Code (Code), and that contributions to the group were deductible for Federal income tax purposes under Section 170(c)(2) of the Code. TA/A is exempt from paying social security and federal unemployment taxes under Sections 3121(b)(8)(B) and 3306(c)(8) of the Code respectively.

In order to be certain that TA/A will retain this status, and avoid a substantial loss of contributions similar to that which respondent has suffered as a result of its loss of these vital rulings, TA/A has refrained entirely from "carrying on propaganda, or otherwise attempting, to influence legislation" although it needs to engage in such activities to carry out its charitable purposes. The Internal Revenue Service has stated that no audit or other administrative action has been brought or is pending which would threaten either the status of TA/A as an exempt organization under Section 501(c)(3) or the ruling that contributions to TA/A are deductible.

On April 30, 1973, TA/A (and co-plaintiff Taxation With Representation) filed suit in the District Court for the District of Columbia to have declared unconstitutional the restrictions on legislative activity in Sections 170(c)(2) and 501(c)(3) and to enjoin Treasury Department officials from the continued enforcement of those restrictions and of all applicable regulations and rulings thereunder. In that litigation, TA/A has alleged numerous grounds for relief. It has argued that these Code restrictions on legislative activities abridge TA/A's First Amendment freedoms of speech, association, and press, and right of petition, by conditioning eligibility for deductible contributions and for tax exemption

upon the surrender of these rights. TA/A also has alleged that these restrictions deny it equal protection of the laws and are unconstitutionally vague. The defendants in that case have filed a motion to dismiss asserting the same jurisdictional objections as those at issue here: the alleged statutory bars to relief in the Anti-Injunction Act, 26 U.S.C. 7421, and the Declaratory Judgment Act, 28 U.S.C. 2201, as well as the assertion of the application of the doctrine of sovereign immunity.

Several positions taken in petitioner's brief, if adopted by this Court, would severely prejudice the TA/A litigation. These positions are incorrect interpretations of the relevant law and precedent, and TA/A strongly urges the Court to reject them.

Specifically, TA/A urges the Court to reject petitioner's arguments: (a) that the scope of the Anti-Injunction Act is so broad as to bar, in addition to respondent's action, all of the suits enumerated on pages 32 and 33 of petitioner's brief including *Tax Analysts and Advocates v. Shultz* (D.D.C., No. 833-73) (Petitioner's brief, pp. 31-34); (b) that the Declaratory Judgment Act has a broader application than the Anti-Injunction Act so as to preclude all litigation seeking declaratory judgments and involving the interpretation and application of the Internal Revenue Code except refund and Tax Court litigation (Petitioner's brief, pp. 37-42); (c) that respondent's suit is barred by the doctrine of sovereign immunity (Petitioner's brief, pp. 42-48); and (d) that the constitutional questions raised by respondent do not justify the convening of a three-judge court (Petitioner's brief, pp. 49-56).

However, since counsel for respondent has fully briefed these issues, TA/A will confine its comments solely to the factual distinction between the tax status of respondent and that of

TA/A, and the ramifications that flow therefrom. While respondent has been reclassified by the IRS from 501(c)(3) to 501(c)(4) status, TA/A continuously has maintained its 501(c)(3) status. Thus, whereas petitioner has argued that the constitutional issues raised by respondent could have been litigated in the context of a refund suit for unemployment taxes paid by respondent or a refund suit brought by a "friendly donor" of funds to respondent (Petitioner's brief, pp. 34-37), *no similar legal remedies are available to TA/A pursuant to which its allegations can be adjudicated.*

TA/A wishes to make this distinction and its ramifications clear because if the Court were to determine that the Anti-Injunction Act and/or the Declaratory Judgment Act barred respondent's suit on the ground that it had adequate available remedies at law in the nature of alternative refund suits, the Court might inadvertently state or imply in its decision that a charity only can litigate the constitutionality of limitations on its activities or the deductibility of contributions made to it in the form of a refund suit. The adoption of such a position would severely prejudice the lawsuit of *Amicus* which seeks declaratory and injunctive relief from the Federal District Court and which is not in a position to bring either of the aforementioned refund suits.

## II. ARGUMENT

The adoption of such a position is unwarranted for two reasons. First, neither of the refund suits suggested by petitioner for respondent, even if found to be adequate for respondent, could be theoretically availed of by TA/A in view of its present classification as a Section 501(c)(3) organization. Second, in order to challenge the constitutionality of the restrictions on legislative activity, TA/A should not be required to engage in substantial legislative activity

so as to lose its status as a 501(c)(3) group, and then bring a refund suit.

Both legal remedies argued by petitioner to be adequate for respondent—a refund suit for unemployment taxes and a “friendly donor” refund suit—are dependent upon the loss by an organization of its status under Section 501(c)(3). By contrast, TA/A has continuously been classified as a 501(c)(3) organization, and it cannot sue for a refund of social security or unemployment taxes because it has paid none. Nor can its donors sue for a refund by alleging that their contributions should have been deductible charitable contributions—since all contributions to TA/A already can be deducted as charitable contributions.

Therefore, to the extent the petitioner’s argument that the Anti-Injunction Act and Declaratory Judgment Act are jurisdictional bars to respondent’s suit depends upon the contention that the respondent had viable legal remedies, these statutory provisions should not bar the TA/A suit to challenge the statutory limitations on its own legislative activities. Moreover, under established principles of law, TA/A should not be required to engage in substantial legislative activities and thus lose its exempt status, or be reclassified like respondent as a 501(c)(4) organization, in order to be able to bring the types of refund suits argued by petitioner to be adequate remedies at law.

In recent years, this Court has continuously upheld the principle that to present a “case or controversy” within the requirement of Article III of the Constitution, a plaintiff need not first violate an allegedly unconstitutional civil law and incur financial or other civil penalties. Specifically, where the Government conditions a license or benefit on forbearance from a constitutionally protected

activity, a plaintiff may litigate the constitutionality of the condition without first having to engage in the activities and subsequently be penalized for having accepted the license or benefit.

A representative recent example of the application of this principle is *Civil Service Commission v. National Association of Letter Carriers*, 41 U.S.L. Week 5122 (U.S. June 25, 1973). Federal employees were among the plaintiffs in this case who sued to have the "Hatch Act" restrictions on partisan politics declared unconstitutional, asserting that a government benefit—federal employment—was conditioned upon forbearance from various protected First Amendment rights inherent in partisan political acts. Only one of the employees already had engaged in partisan politics while in federal service—the penalties for which were exclusively civil, ranging from dismissal to thirty days suspension without pay. Although this Court found on the substantive question that the Hatch Act prohibitions were constitutional, none of the Justices indicated any reservations about the existence of a justiciable case or controversy with respect to any of the employees.

For additional recent cases illustrative of the same principle see: *Keyishian v. Board of Regents*, 385 U.S. 589 (1969), (loyalty oath for government employment is challengeable without first having to be taken); *Kent v. Dulles*, 357 U.S. 116 (1958); *Baird v. State Bar*, 401 U.S. 1 (1971); *Konigsberg v. State Bar*, 353 U.S. 252 (1957), (passport and bar admission application questions may be challenged without having to be answered); *Healy v. James*, 408 U.S. 169 (1972), (prior restraints on the use of campus facilities may be challenged without first having to use them).

So, here, TA/A is not required to engage in substantial legislative activities and lose its current tax exempt status

before it can litigate the constitutionality of the restrictions on such activities.

### III. CONCLUSION

*Amicus* urges this Court to find that there are no jurisdictional bars to respondent's suit. However, if the Court determines that respondent is barred from declaratory or injunctive relief because it has adequate available remedies at law in the form of alternative refund suits, the Court should make clear that such a determination would not apply to bar *Amicus*, which still maintains its Section 501(c)(3) status, from obtaining the injunctive and declarative relief it is now seeking in the Federal District Court for the District of Columbia.

Respectfully submitted,

THOMAS F. FIELD

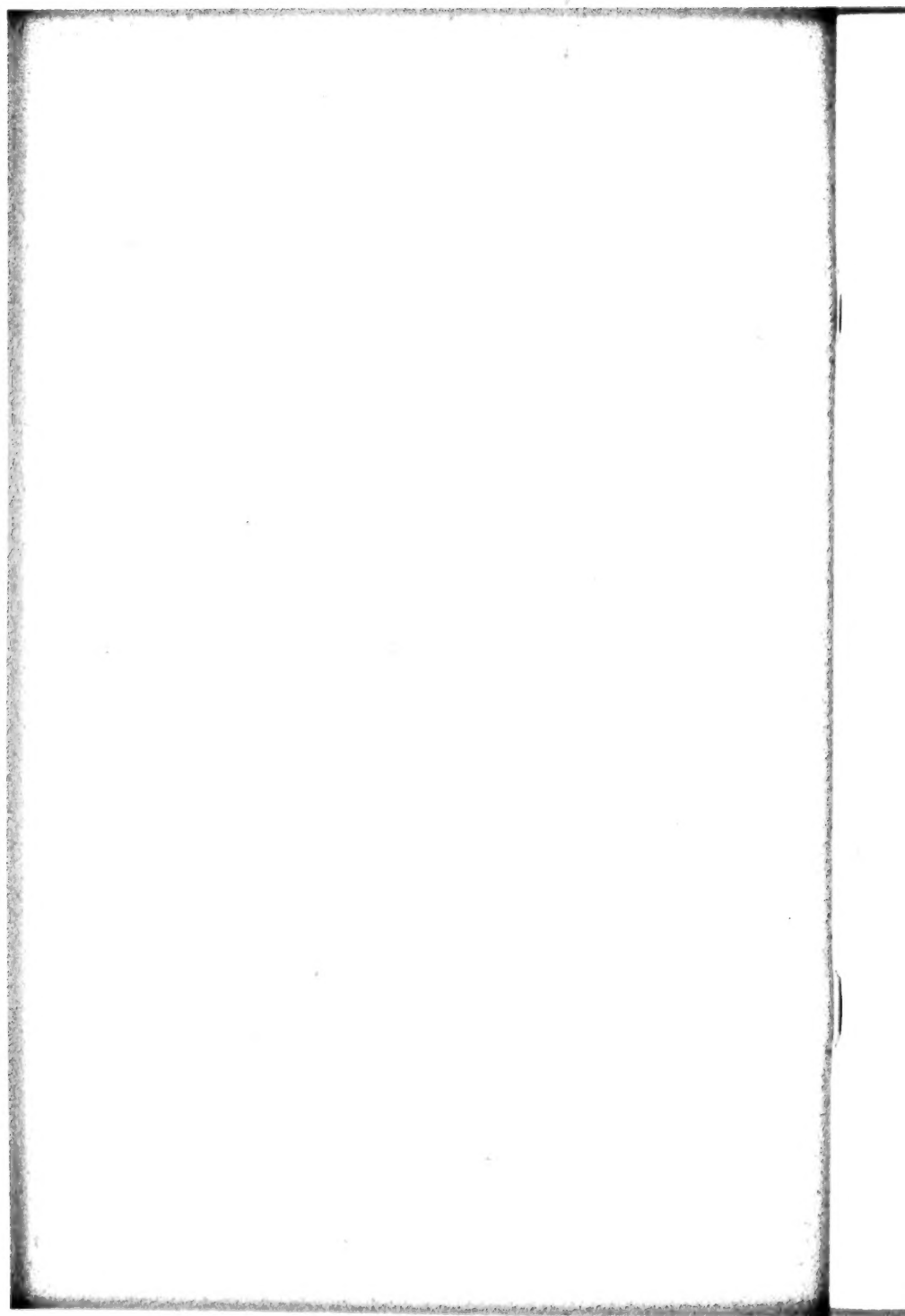
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September, 1973







No. 72-1371

U. S. SUPREME COURT  
FILED

SEP 26 1973

IN THE  
**Supreme Court of the United States**

October Term, 1973

DONALD C. ALEXANDER,  
Commissioner of Internal Revenue,  
*Petitioner,*

v.

"AMERICANS UNITED" INC.,  
*Respondent.*

On Writ of Certiorari to the United States Court of Appeals For  
The District of Columbia Circuit

**BRIEF FOR THE RESPONDENT**

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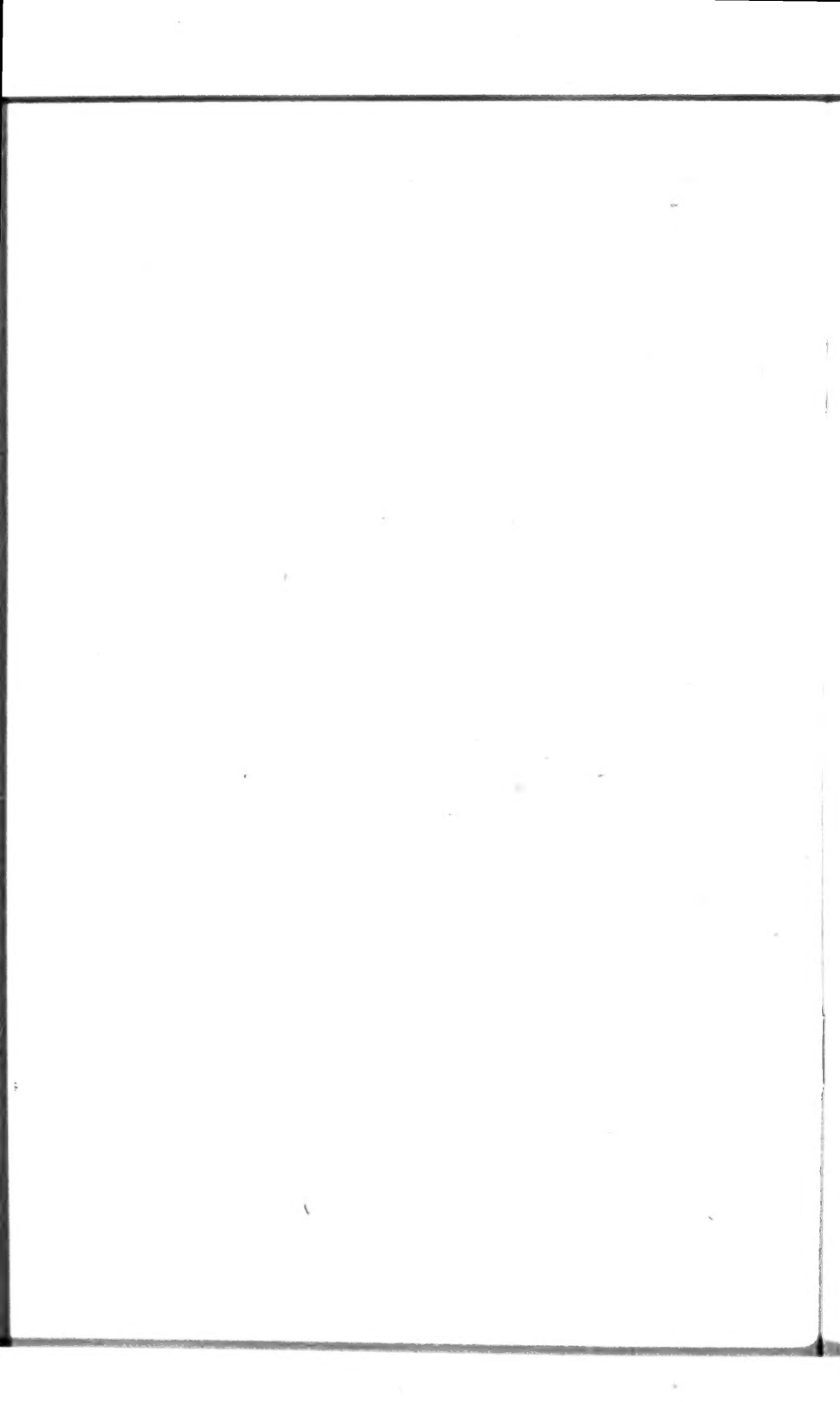
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1973

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**No. 72-1371**

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DONALD C. ALEXANDER,  
Commissioner of Internal Revenue,  
*Petitioner.*

v.

"AMERICANS UNITED" INC.  
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**BRIEF FOR THE RESPONDENT**

**OPINION BELOW**

The opinion of the Court of Appeals (A<sup>1</sup> 22-45) is now officially reported at 477 F.2d 1169.

**STATEMENT OF THE CASE**

Respondent was organized as a non-profit, educational corporation under the laws of the District of Columbia in 1948. On July 3, 1950, the Commissioner issued a ruling exempting respondent from income taxation under the predecessor of section 501(c)(3) of the Internal

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<sup>1</sup>"A" references are to the separately bound record appendix.

Revenue Code of 1954. The effect of this ruling was also to establish respondent's eligibility to receive contributions which would be deductible by the donor under the predecessor of section 170(c)(2) of the 1954 Code. After it obtained its ruling letter, respondent's name was added to the Commissioner's official list of organizations to which contributions are tax deductible (hereinafter the "cumulative list"). Thereafter, respondent was able to begin its fund raising in earnest since the ability to assure donors that their contributions will be deductible is the *sine qua non* for obtaining financial support for organizations such as respondent.

Beginning in 1965, the Internal Revenue Service commenced an investigation into the activities of respondent with a view toward the possible revocation of the 1950 ruling. After unsuccessful attempts to work the matter out administratively, the Commissioner revoked the 1950 ruling on April 25, 1969 on the ground that respondent had violated sections 170(c)(2)(D) and 501(c)(3) by devoting a substantial part of its activities to attempting to influence legislation (A 7-10). Shortly thereafter respondent was issued a ruling exempting it from income taxation as a social welfare organization under section 501(c)(4) of the Code. However, this change in status meant that contributions to Americans United were no longer deductible by a donor under section 170(c)(2). As a result contributions to Americans United dropped off sharply so that for the first time in twenty years it was unable to raise sufficient funds to fully offset its expenses (A 15). Since respondent continued to be exempt from income taxation under section 501(c)(4),<sup>2</sup> the only change in its own tax status was that it

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<sup>2</sup>Even if it were not exempt under section 501(c)(4), it is unlikely that Americans United would have had any taxable income since contributions are excluded from taxable income by section 102.

had to pay employment taxes pursuant to section 3301 because its prior exemption under section 3306(c)(8) was lost when its 501(c)(3) status was revoked.

Because the ruling caused a significant decline in its contributions, respondent filed suit in the United States District Court for the District of Columbia on July 30, 1970, to challenge the legality of the revocation on a variety of grounds.<sup>3</sup> It alleged that the substantiality test of sections 170(c)(2) and 501(c)(3) created an unconstitutional disparity between large and small organizations, with a larger, wealthier organization being able to spend far more on its legislative efforts than its smaller and poorer brethren without running afoul of the substantiality test. The complaint also alleged that the Commissioner had penalized respondent by revoking its ruling because of its attempts to influence legislation and that it was unconstitutional to penalize First Amendment activities in this fashion. It further alleged that the statutory standards of "substantiality" and "propaganda" were so lacking in specificity as to be devoid of meaning and hence unconstitutional (A 15), especially since crossing these vague boundaries would result in the severe penalty of losing the right to receive tax-deductible contributions.

Jurisdiction was claimed under 28 U.S.C. §1331, since the amount in controversy resulting from lost contributions exceeded \$10,000, under 28 U.S.C. §1340 since the case was one "arising under [an] Act of Congress providing for internal revenue", and under 5 U.S.C. §§701-706, section 10 of the Administrative Procedure Act, as an action to review

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<sup>3</sup>Since it is the allegations of the amended complaint which were used by the District Court and Court of Appeals to determine whether a substantial constitutional question was presented, references throughout the brief will be to the amended complaint (A 11-17) rather than to the original complaint.

the final determination of the Service that respondent was no longer entitled to receive tax-deductible gifts. Because of the challenge to the constitutionality of various aspects of sections 170(c)(2) and 501(c)(3), respondent sought the convening of a three-judge court pursuant to 28 U.S.C. §2282.

The Government moved to dismiss the action, contending that there was no subject matter jurisdiction, that the complaint failed to state a claim upon which relief could be granted, that it sought a declaratory judgment with respect to federal taxes and was thus barred by a proviso in the Declaratory Judgment Act, 28 U.S.C. §2201, and that the provisions of section 7421 of the Internal Revenue Code, the Anti-Injunction Act, prohibited the granting of the injunctive relief sought (A 18-19). Just six days after argument the District Court entered a brief order dismissing the action. It found no substantial constitutional question<sup>\*</sup> and held that the anti-injunction provisions of section 7421(a) and the exception to the Declaratory Judgment Act prohibited the relief sought by respondent (A 21).

Although the appeal was briefed in a timely fashion, it was not until early September 1972, or almost a year and a half after the dismissal in the District Court, that the case was argued. After argument had been scheduled, petitioner filed a supplemental memorandum in the Court of Appeals raising for the first time the possibility that Americans United itself had a means to test the legality of the ruling revocation. That memorandum was submitted in response to the contention of Americans United in its reply brief that the Commissioner's position had left it with no available remedy and thus raised the most serious constitutional questions. The Commissioner countered with his suggestion that a suit for refund of employment taxes (hereinafter "FUTA taxes"), which Americans United

began to pay after the revocation of its 501(c)(3) ruling, was available to challenge the legality of that revocation.<sup>4</sup>

On January 11, 1973, the Court of Appeals handed down its opinion, reversing the decision of the District Court and remanding the matter for the convening of a three-judge court. It rejected the Government's arguments that the Anti-Injunction Act and the exception to the Declaratory Judgment Act precluded respondent from obtaining judicial review in the manner sought. It held the Government's defense of sovereign immunity to be inapplicable and found the constitutional questions presented to be "substantial" and thus to require the convening of a three-judge court. On June 4, 1973, the Government's petition for a writ of certiorari was granted.

### STATUTES INVOLVED

The relevant portions of the Internal Revenue Code, Declaratory Judgment Act, and the applicable jurisdictional statutes are set forth in the Appendix, pages 48-54, *infra*.

### SUMMARY OF ARGUMENT

The issue in this Court is whether a charitable organization such as Americans United is prohibited from bringing a suit for injunctive relief in a district court in order to obtain meaningful review of a decision of the IRS to deny it the right to receive tax deductible gifts, where that denial raises substantial constitutional questions. The issue is not the right to make the challenge; the Government concedes that judicial review of some sort is entirely proper.

<sup>4</sup>The Commissioner also suggested that a refund suit for social security taxes would be available, but for the reasons set forth in Note 13 of the Opinion of the Court of Appeals (A 35-36), Americans United was unable to avail itself of that suggestion.

The dispute arises, then, over the proper procedures and whether Congress in the Anti-Injunction Act and the exception to the Declaratory Judgment Act has specifically precluded this kind of action.

The primary contention of the Commissioner is that the prohibition of section 7421(a) against injunctions "for the purpose of restraining the assessment or collection of any tax" and the exception to the Declaratory Judgment Act, which prohibits rulings "with respect to federal taxes", operate to bar Americans United from testing the legality of the ruling revocation in the manner sought in this action. It is petitioner's contention that the only method by which respondent can raise the issue in court is by means of a suit for the refund of FUTA taxes which are now payable since the exemption from those taxes applies only to 501(c)(3) and not 501(c)(4) organizations. The outcome of this controversy turns upon whether the prohibitions which concededly apply to most, but not all, tax cases apply in this instance where what is at issue on the merits is essentially a constitutional and not a tax question.<sup>5</sup>

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<sup>5</sup>Petitioner argues (Br. 37-42) that, even if the Anti-Injunction Act does not preclude the maintenance of this action, the exception to the Declaratory Judgment Act does. In our view the Declaratory Judgment Act neither strengthens nor weakens our case. We concede that, if an injunction is prohibited by section 7421, we cannot circumvent this bar by use of the Declaratory Judgment Act. As Judge Tamm pointed out in his opinion in the Court of Appeals, the exception to the Declaratory Judgment Act was added to prevent taxpayers from using that Act to circumvent section 7421, and the prohibitions were intended to be coextensive. (A 29-30). The legislative history cited by Judge Tamm establishes that this was the purpose of adding the proviso to the Declaratory Judgment Act, and none of the authorities cited by petitioner (Br. 38-41) holds to the contrary. Respondent can obtain full relief without the Declaratory Judgment Act, and accordingly we will make no further reference to it in this brief, and will deal solely with section 7421.

It is respondent's position that the Commissioner has sought to apply section 7421 to a case which is neither literally within its prohibitions, nor comes within its purpose. The Anti-Injunction Act was intended to protect the Government in the collection of revenue and to require taxpayers to contest tax determinations in the manner prescribed by law and not by injunctive actions. Since this case does not seek to restrain the assessment or collection of any taxes owed by Americans United, it falls outside the terms and purposes of section 7421, and hence that provision has no applicability here.

In addition, the Government has disregarded significant and highly relevant Supreme Court decisions, in particular *Allen v. Regents of the University System of Georgia*, 304 U.S. 439 (1938), which have permitted injunctive actions in situations analogous to this one to be maintained in spite of the prohibition of section 7421. Petitioner has, in our view, placed undue reliance upon this Court's decision in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962), where the taxpayer sought to enjoin the assessment and collection of taxes that were directly payable by it, whereas no such relief is sought here. Although the language in *Enochs* is broad, its facts are readily distinguishable from those presented here, and it should not be applied in this situation.

Furthermore, the Commissioner fails to appreciate the inadequacy of the remedy which he suggests. Because of the intricacies of the tax law, it is questionable whether a suit for refund of FUTA taxes is realistically available in this case or in many others where an organization is denied the right to receive tax-deductible contributions. Such suits are beset with serious problems of delay and the real possibility that the issues which the organization seeks to have adjudicated will not be passed upon by the Court. Moreover, even if the refund suit were to result in a full adjudication in



plaintiff's favor of the legal issues which it raises, it can never "refund" contributions which respondent has lost in the interim; the relief is limited to the return of relatively insignificant FUTA taxes paid. The absence of meaningful alternate remedies distinguishes this case from *Enochs* and the other authorities relied upon by the Commissioner, and brings it squarely in line with the decisions of this Court which have permitted injunctions to issue in spite of the prohibition of section 7421.

The Commissioner's claim of sovereign immunity is also without merit. That defense has never been a bar in any of the other section 7421 cases because the rule laid down by this Court in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), which permits an injunction against unconstitutional or illegal activities by a federal officer, is applicable in these situations. Moreover, petitioner's attempt to distinguish *Larson* focuses only on one of the several prayers for relief—the placing of plaintiff's name on the cumulative list of exempt organizations. Even if sovereign immunity applies to that kind of affirmative relief, it has no bearing on the right to obtain other orders that will enable respondent to receive tax-deductible contributions once again.

The final contention of the Government—that there is no "substantial" federal question requiring the convening of a three-judge court—is also in error. An issue is "constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous. . . ." *Goosby v. Osser*, 409 U.S. 512, 518 (1973). The Court of Appeals correctly held that at least one argument of Americans United—that the substantiality test of sections 170(c)(2)(D) and 501(c)(3) unconstitutionally discriminates against it as a small organization when compared with larger organizations—raised a non-frivolous question requiring the convening of a three-judge court. *Cammarano v. Commissioner*, 358 U.S. 498 (1959), so heavily relied upon by

petitioner, is not dispositive since the discrimination alleged here was not presented to this Court for a decision in that case.

In addition, although not stressed in the Court of Appeals, the complaint contains several other constitutional issues which are clearly substantial. *Cammarano, supra*, which dealt with the deductibility of lobbying expenses, did not pass upon the constitutionality of conditioning the right to receive tax deductible contributions upon a surrender of the First Amendment right to petition the Government. Imposing a severe penalty for exercising that right clearly goes beyond the denial of a deduction for the cost of exercising it, and thus raises serious constitutional question under *Speiser v. Randall*, 357 U.S. 513 (1958). Moreover, no decision of this Court has ruled on the allegations of plaintiff that the standards "substantiality" and "propaganda" in section 501(c)(3) are so vague as to be constitutionally invalid (A 15), particularly in light of the heavy penalty that overstepping these hazy boundaries can cause. While respondent may not ultimately prevail in its constitutional challenges, this Court has made it clear that no such certainty is required before convening a three-judge court.

## ARGUMENT

### I.

#### THE RIGHT OF RESPONDENT TO CHALLENGE THE RULING REVOCATION IN THE MANNER SOUGHT IS OF VITAL IMPORTANCE TO IT.

While this case arises under the Internal Revenue laws, it really has very little connection with the taxes of Americans United. The sole tax consequence to respondent itself from a victory in this case would be the elimination of

FUTA taxes, which never reached \$1,200 for any of the four years following the revocation. See Pet. Br. p. 4, note 2. Those taxes are inconsequential when compared with the loss in contributions resulting from the revocation. In fact, the revocation letter only advised respondent that it was liable for income taxes,<sup>6</sup> and failed to mention that its exemption from FUTA taxes was also lost. (A 10). The connection between the ruling revocation and the imposition of FUTA taxes was first pointed out to respondent in August 1972, when the Government filed its supplementary memorandum in the Court of Appeals. The complaint makes no mention of such taxes and specifically states that it is not seeking the refund of any taxes (A 15). None of this is surprising when one considers that, while this suit was pending in the District Court, the then Commissioner of Internal Revenue, Randolph W. Thrower, stated that the only method of obtaining judicial review of a determination denying an organization its 501(c)(3) status was by a suit brought by a donor who "as a guinea pig" made a contribution for which a deduction was denied as a result of that determination. R. W. Thrower, *New Developments in Tax-Exempt Institutions*, 34 Journal of Taxation 168 (March 1971). If the Commissioner himself did not consider the availability of a FUTA remedy, it is no small wonder that taxpayers and their counsel did not consider it or regard it as an adequate remedy.

The real problem for respondent lies not in the imposition of the minimal FUTA tax imposed by section 3301, but in the loss of its eligibility to receive contributions which are deductible under section 170(c)(2).<sup>7</sup> For better or

<sup>6</sup>Later modified by the granting of 501(c)(4) status.

<sup>7</sup>When grants are sought from private foundations, it is not the deductibility question that creates the problem, but the liability that may be incurred by a private foundation for making a gift for purposes other than those described in section 170(c)(2). See section 4945(d)(5). In any event, the effect of the ruling revocation on the charity is the same—the denial of access to funds.

for worse, an assurance of deductibility under section 170(c)(2) is essential to the fund-raising activities of a very large number of charitable organizations in this country. Gifts of cash or appreciated property are made in most cases only if they are deductible, and an organization unable to provide an assurance of deductibility would generally find it impossible to raise enough money to sustain its operations. The purpose of this action is to obtain reinstatement of the essential ruling which enabled respondent to give would-be donors such assurances, and thus a FUTA tax refund suit would be only a back-door device to achieve the end which the Commissioner suggests is barred by section 7421.

The decision of the Court of Appeals (A 32), as well as that of the Fourth Circuit in *Bob Jones University v. Connally*, 472 F.2d 903, 906, *rehearing denied*, 476 F.2d 259 (1973), *petition for writ of certiorari pending*, No. 72-1470, acknowledges that the ability to attract tax-deductible contributions is a major factor in the financial success of an organization such as Americans United. Inclusion on the Service's cumulative list of qualified organizations is, in effect, a license to begin serious solicitation of contributions. In part because the requirements for qualification for a favorable ruling are not wholly self-explanatory, and in part because of the wide variety of organizations that apply for such rulings, the process by which the ruling is given, and the taxpayer's name added to the cumulative list, involves negotiation, explanation, and compromise with the employees of the Service. It is through this kind of process, which stretches over many months and sometimes years, that the organization's position is presented to the Service, and objections are voiced, and corrections can be made. It is only after the Service becomes satisfied that all of the requirements of the statute have been met that it will issue the ruling giving the advanced assurance of deductibility.

We do not understand the Commissioner to dispute the importance of the advance assurance of deductibility and the value of the inclusion of respondent's name on the cumulative list. Thus, what is at stake here is not simply an issue of tax procedure, but the right of a charitable organization to make a meaningful challenge to the loss of its "license" to receive tax-deductible contributions. We submit that the right to make this challenge should apply in cases such as this, where respondent contends that the underlying statutes which caused the revocation are themselves unconstitutional, or where a revocation decision is arbitrary, capricious, or without foundation in fact or law.

If the Commissioner is correct in his interpretation of section 7421, organizations may have to go out of business or at least seriously cut back on their activities because of the absence of any means to maintain the flow of tax-deductible gifts. Furthermore, without direct access to injunctive relief in a district court, some taxpayers will accede to the demands of the Service, even where those demands are improper, because they cannot be resisted in view of the enormous power wielded by the Service in denying or revoking tax rulings. Since some of the positions taken by the Service restrict the freedom of speech and action of charitable organizations beyond the limitations clearly imposed by the Code, the denial of a remedy here poses most serious First Amendment problems. On the other hand, the existence of a remedy, even one which is rarely invoked, can have a salutary effect on an administrative agency which has its actions insulated from meaningful judicial review. Finally, it cannot be overlooked that organizations such as Americans United are primarily engaged in protected First Amendment activities, *i.e.*, the right to associate freely and to speak out on matters of concern to them, quite apart from their right to petition the Government for redress of grievances. Thus, the absence of a right of direct access to

the courts by organizations which are trying to establish their right to continue to engage in First Amendment activities raises serious constitutional problems of prior restraint, see *Freedman v. Maryland*, 380 U.S. 51 (1965), which can be avoided by holding section 7421 to be inapplicable to this situation.

In the face of the strong need shown by charitable organizations to obtain the relief sought, it would be expected that the Commissioner, who concedes that section 7421 can be waived (Br. p. 29, note 18), would have weighty considerations to urge in his behalf before invoking it. Yet that is not the case. The contention that there would be a significant disruption in the collection of the revenue does not withstand scrutiny. First, no injunction against the collection or assessment of respondent's taxes was sought here, but even if it were sought and granted, the taxes involved are the trifling amounts due under FUTA. In many cases not even those would be payable because of the statutory exemptions for small organizations under section 3306(a), and because some charities would not be able to afford to pay salaries without the benefit of tax-deductible contributions.

Petitioner argues that the taxes which would not be paid as a result of an injunction would be those payable by donors and that the purpose of section 7421 would be circumvented in that manner. This argument is of dubious accuracy, however, since it is likely that after a ruling revocation many donors would simply re-direct their largesse to another organization which is on the Commissioner's cumulative list. Thus, while there may be some loss of revenue resulting from an injunction against a ruling revocation, no significant disruption in the collection of any taxes is likely. In fact, the contrary may be true since, if donors refrain from making contributions, money will not be available to pay the salaries of employees and to make other purchases, and hence taxes on those transactions

would not be payable to the Government. In short, while it is conceivable that some revenue loss may result from the granting of an injunction, it is almost certain that the loss would not be significant and that any harm to the Government from that loss is vastly outweighed by the harm to the aggrieved organization by reason of the loss of contributions resulting from a ruling revocation. Finally, it cannot be assumed that the mere filing of a complaint and an application for preliminary relief will automatically result in a victory for the organization and a loss for the Commissioner. Although the equities may be weighed heavily in favor of the charity, it still must satisfy the burden of showing a likelihood of success before an injunction can issue. See *Virginia Petroleum Jobbers Ass'n v Federal Power Comm.*, 259 F.2d 921 (D.C. Cir. 1958).<sup>8</sup>

The named plaintiff here is Americans United, but the outcome of this case potentially affects every organization in this country which depends upon tax-deductible contributions for its finances. We submit that the clearest congressional command should be required before denying such organizations a meaningful opportunity to challenge the IRS' administrative actions in revoking their licenses to receive tax-deductible contributions. Moreover, as demonstrated below, the purposes of section 7421 would not be served by applying it here, nor do the decisions of this Court command any such result.

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<sup>8</sup>Any suggestion that a ruling in respondent's favor would open the floodgates of litigation in the district courts (Br. 33) necessarily implies that the Commissioner is either enforcing a large number of statutes whose constitutionality is in sufficient doubt and whose effects are sufficiently harsh as to warrant the time and expense of challenging them, or that employees of the Service are regularly acting in an arbitrary or capricious manner. Neither of these propositions has yet been demonstrated.



## II.

**THE PURPOSE OF SECTION 7421 DOES  
NOT SUPPORT ITS APPLICATION IN THIS  
CASE.**

The predecessor of section 7421(a), the Anti-Injunction Act, was enacted in 1867 as section 10 of the Act of March 2, 1867, c. 169, 14 Stat. 475 and was codified as R.S. §3224 (2d Ed. 1878). This prohibition against any suit "for the purpose of restraining the assessment or collection of any tax" was expressly enacted so that "there might be no misunderstanding of the universality of this principal. . . ." *State Railroad Tax Cases*, 92 U.S. 575, 613 (1876). In fact, prior to the enactment of R.S. §3224, equity courts would not enjoin the collection of a tax solely on the grounds of illegality, but required other equitable grounds for invoking injunctive relief. See *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932). It thus appears that the Anti-Injunction Act was little more than a codification of the prior principle of non-interference with the collection of taxes, except in extraordinary situations, a view which is fully supported by other decisions of this Court described in Point III.

The policy of non-interference with the collection of taxes embodied in the Anti-Injunction Act has been described by this Court as one "founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment. . . ." *State Railroad Tax Cases*, *supra* at 613-614. As this Court noted in *Snyder v. Marks*, 109 U.S. 189, 191-192 (1883), the Anti-Injunction Act was added to the tax refund provisions to indicate a clear expression on the part of Congress that the refund method was considered to be fully adequate to redress errors concerning the collection of



taxes. Thus, it appears that Congress intended that the refund statutes and the Anti-Injunction Act would provide a "complete system of corrective justice in regard to all taxes imposed by the General Government. . . ." *State Railroad Tax Cases*, *supra* at 613.

Recent expressions of the purposes of the Anti-Injunction Act accept the same rationale. The brief for the Government in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962) (p. 13) described the twofold purpose of section 7421 in this way:

—institution of a uniform system for a judicial determination of the correctness of a tax assessment and protection of the government's paramount need of being able to collect its revenues without dependence upon a prior judicial adjudication—

This Court appears to have concurred with that statement in its decision in *Enochs*, where Chief Justice Warren stated that the "manifest purpose" of section 7421 is to "permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner, the United States is assured of prompt collection of its lawful revenue." 370 U.S. at 7. See also *Thrower v. Miller*, 440 F.2d 1186, 1187 (9th Cir. 1971).

It should be apparent that a statute enacted in 1867, when there were no exempt charitable organizations, no rulings by the Revenue Service, and no need to insure tax deductions for their donors, cannot have been originally intended to apply to the situation presented here. None of the amendments to the Anti-Injunction Act has in any way touched upon the problem of ruling revocations for charitable organizations. Thus, if the Act is found to apply in this case, it must be because its underlying purposes

would be advanced by applying it in this instance. Yet the "manifest purpose" of assuring the prompt collection of tax revenues has virtually nothing to do with this lawsuit. What is involved here is the right of a charitable organization to continue to receive life-sustaining contributions. Since there will be virtually no effect on the revenue from issuing an injunction in this case, it is apparent that the revenue-gathering purposes of section 7421 will remain intact even if the Act is held to be inapplicable here. Thus, the absence of any rational purpose for invoking section 7421 is reason enough for this Court to sustain the decision below. But as we shall now demonstrate, there are also decisions of this Court which strongly support respondent's position.

### III.

#### DECISIONS OF THIS COURT DIRECTLY SUPPORT THE RULING OF THE COURT OF APPEALS

This Court's most recent decision construing the Anti-Injunction Act, *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962), is the cornerstone of the Government's case. In our view it is distinguishable on its facts from the instant action, and moreover did not fully consider precedents of this Court which, while having little bearing there, are of great significance in this case.

Unlike the instant action, the avowed purpose of the plaintiff in *Enochs* was the restraining of the collection and assessment of \$41,568.57 in social security and FUTA taxes—the very taxes which respondent here has paid and will continue to pay until a final judgment is entered in its favor. When the action in *Enochs* was filed, taxes for three prior years were then due, but the taxpayer contended that the full payment would cause him to go into bankruptcy.

370 U.S. at 5. In ruling that the Anti-Injunction Act applied unless the plaintiff could establish both the inadequacy of its legal remedy and that under no view of the facts or law could the Government possibly prevail, this Court stated that harm to plaintiff from the collection of these taxes was not legally sufficient. Clearly, *Enochs* is an example of the classic case for which section 7421 was intended: a taxpayer with a genuine dispute with the collector about a tax liability and with a claim, often difficult to verify, that financial ruin would result from payment. It was to prevent this very kind of suit and to assure the prompt collection of revenue that section 7421 was originally enacted and its applicability to *Enochs* could hardly have been disputed.<sup>9</sup>

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<sup>9</sup>We respectfully suggest that the Chief Justice's reliance on the differences in language between section 7421 and 28 U.S.C. §1341, a point not briefed by either party, as a basis for the decision in *Enochs* is misplaced. The latter provision, which prohibits injunctions against the assessment or collection of any state tax, contains an explicit exception for situations in which there is no "plain, speedy and efficient remedy" in the courts of the state. From this explicit exception the Court concluded that Congress knew how to make adequacy of remedy the controlling test, and that the absence of such a provision in section 7421 indicated an intention on the part of Congress that adequacy of remedy was not to be the controlling factor under that statute. 370 U.S. at 7-8.

The legislative history of section 1341 contains little support for that analyses. The bill's sponsor, Senator Bone, noted that the bill was "not novel in character" and cited the predecessor of section 7421 as well as a similar statute prohibiting injunctive actions with respect to Puerto Rican taxes. He also pointed to the Johnson Act of 1934, 45 Stat 775, now codified as 28 U.S.C. §1342, which contains prohibitions against injunctions of administrative decisions of state utility commission where is a "plain, speedy, and efficient" state court remedy. Throughout his discussion he treated both the absolute

(Footnote continued on next page)

Although invoking the Anti-Injunction Act in *Enochs*, this Court recognized that the statutory prohibition, which is absolute on its face, had never been construed to exclude all exceptions. The discussion of the exceptions, however, was confined to the decision in *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932), which *Enochs* construed as requiring that, in addition to general equity jurisdiction and an illegal tax, the illegality must be an exaction in "the guise of a tax", 370 U.S. at 7, which the *Enochs* court interpreted to mean a tax that could under no circumstances be properly collected. While that construction of section 7421 covers cases similar to the *Nut Margarine* decision, it overlooks significant other decisions by this Court which in differing circumstances have found the Anti-Injunction Act to be inapplicable. In general, those other exceptions have been created where the tax was either not imposed against the party bringing suit, or was intended to provide coercion to comply with a regulatory scheme rather than to raise revenue.

For example, in *Hill v. Wallace*, 259 U.S. 44 (1922), a

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(Footnote 9 continued from page 18)

statutes, such as 7421, and the Johnson Act identically. See 81 Cong. Rec. 1415-1417 (1937).

Moreover, the Senate report accompanying the bill suggests no distinction of the kind drawn by the Chief Justice. "This legislation does not introduce a new principle, since the Congress has passed statutes of similar import." S. Rep. No. 1035, 75th Cong., 1st Sess. 1 (1937). The House Report incorporated the Senate report and added a legal brief which quoted from a recent decision of this Court, *Matthews v. Rogers*, 284 U.S. 521, 526 (1932), which held that injunctions against state taxes could be issued only where there was no "plain, adequate and complete" remedy in the state courts. H. Rep. No. 1503, 75th Cong., 1st Sess. 4 (1937). Thus, it is difficult to understand the basis upon which it was concluded in *Enochs* that sections 7421 and 1341 contained different standards.

suit was brought against the Secretary of Agriculture and various officials of the Internal Revenue Service to prevent the collection of a tax on grain futures, the imposition of which would, as a practical matter, have required the Chicago Board of Trade either to cease operating or to comply with certain regulatory provisions allowing for an exemption from the tax. This Court, in sustaining the action and issuing an injunction against the local collector of revenue, noted that there were "extraordinary and entirely exceptional circumstances" making the Anti-Injunction Act inapplicable. 259 U.S. at 62. Viewed objectively, both *Hill* and this action primarily seek to challenge regulatory statutes and were not brought to prevent the imposition of taxes needed to finance the Government. That this Court in *Enochs* relegated *Hill* to a footnote and that *Hill* was not mentioned in either side's brief, support our position that *Enochs* did not supplant *Hill* because the latter case was not considered by this Court or the parties to be relevant. Since in both *Hill* and this case there exist "exceptional and extraordinary circumstances", and since in both cases the purpose of safeguarding the revenue would not be thwarted by holding the Anti-Injunction Act to be inapplicable, section 7421 should be no more of a bar here than it was in *Hill*.

In a similar case, *Lipke v. Lederer*, 259 U.S. 557 (1922), this Court again refused to apply the Anti-Injunction Act to restrain the collection of a "tax" on liquor which the Court found to be in reality a penalty for violation of the crime of possessing liquor. As the Court noted, the tax lacked "all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government,' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty." 259 U.S. at 562 (citations omitted.). Similarly

here, the primary effect of the revocation of the ruling was not to impose FUTA taxes on Americans United but to penalize it by rescinding its license to raise tax-deductible funds. We do not contend that the difference between the primary and secondary effects of a particular action by a governmental official can always be discerned or always provide a touchstone. However, since the main thrust of the revocation here is undeniably the imposition of a significant burden on respondent's fund raising capabilities, this fact should be considered in determining whether the prohibitions of section 7421 were intended to apply to this situation, or whether, as this Court found in *Lipke*, section 7421 has no relevance in cases of this kind.

The decision of this Court which most nearly approximates the instant case is *Allen v. Regents of the University System of Georgia*, 304 U.S. 439 (1938). Like *Hill*, it was relegated to a footnote in *Enochs*, undoubtedly because the cases were seen by the Court to be distinguishable.<sup>10</sup> The plaintiff in *Allen* was the University System of Georgia, which claimed that a federal tax on admissions, as applied to state-sponsored collegiate athletic contests, was unconstitutional. The tax was imposed on the spectators, but the University was required to collect it and pay it over to the Government. In addition, all tickets were required to show the percentage of the total ticket price which the tax comprised. A failure to comply with these provisions resulted in a penalty only in cases of willfulness.

The university was found to have standing to raise the constitutionality of the tax because of the significant burden and expense imposed on it in collecting the tax and

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<sup>10</sup> The taxpayer's brief in *Enochs* did not rely upon *Allen*, but merely sought to demonstrate that it did not support the Government's position. (Res. Br. p. 22)



filing the required returns, 304 U.S. at 448. However, since the tax was not payable by the University, its original attempt to litigate the question by a claim for refund of the taxes which it collected and paid over was dismissed by the Commissioner on the grounds that the money sought to be refunded was not the University's. 304 U.S. at 446. This Court stated that the plaintiff had a good faith belief that the statute was unconstitutional and that it was "entitled to have a determination" on that question. 304 U.S. at 448. The Government claimed that the Anti-Injunction Act applied, but this Court ruled that the statute is "inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at law." 304 U.S. at 449. In holding that section 7421 was not a bar, this Court noted that "respondent was unable by any other proceeding *adequately* to raise the issue of the unconstitutionality of the government's effort to enforce payment." *Id.* (emphasis added).

Having found the Anti-Injunction Act to be inapplicable, the Court decided the merits and upheld the statute's constitutionality. This fact is of vital significance in determining the relation between *Allen* and *Enochs* since the latter stated that an injunction would lie *only* if "it is clear that under no circumstances could the government ultimately prevail. . . ." 370 U.S. at 7. However, in *Allen* it was certainly not "clear" that the Government would not prevail, and in fact the Court held in the same decision that the Government was correct on the merits. Thus, it is obvious that either the exception in *Enochs* is not exclusive, or that *Enochs* overruled *Allen* *sub silentio*. In our view the evidence points strongly toward non-exclusivity since *Allen* is distinguishable from *Enochs*. In *Allen* the plaintiff was not objecting to a tax imposed on it, as it was in *Enochs*, but was seeking to obtain an adjudication which, while having the effect of reducing the taxes of others, was

primarily directed at relieving a non-tax burden on itself. Thus, there is no reason to believe that *Allen* is not still the law in the circumstances presented there.

Since Americans United does not seek to restrain the assessment or collection of any tax imposed upon it but seeks merely to relieve itself of a different burden—the burden of not being able to raise funds—*Allen* is in point and section 7421 is inapplicable. As in *Allen* there is “no plain, adequate and complete remedy at law”, and hence Americans United should be permitted to bring this action without regard to section 7421.<sup>11</sup>

In this connection it should be noted that, even in the face of congressional enactments of specific statutory exemptions to section 7421, this Court has never considered its literal prohibitions to be absolute. Thus, section 7421(a) now includes a specific grant of the right to injunctive relief in accordance with the provisions of the sections noted therein. One of those sections, section 6213(a), provides for injunctive relief when a taxpayer has a pending petition before the tax court on income, gift or estate tax liabilities, notwithstanding section 7421. The income and estate tax exclusions date back to the Revenue Act of 1926, sections 274(a) and 308(a), 44 Stat 55 and 44 Stat 75, respectively. Yet this Court in both *Nut Margarine* and *Allen*, which were decided subsequent to their enactment, upheld the existence of implied exceptions to the absolute prohibition of the predecessor of section 7421(a) in spite of the Congressional inclusion of specific exceptions.

Case law has also produced other exceptions to the Anti-Injunction Act, such as for disputes involving the title to

<sup>11</sup>The examples cited by petitioner (Br. 27, note 17) of other instances which would fall within this rule are all distinguishable since they do not involve a ruling essential to the very existence of an organization which is engaged in First Amendment activities.



property which the Government has claimed under a tax lien. In *Tomlinson v. Smith*, 128 F.2d 808 (7th Cir. 1942), for example, the Court denied the Government's claim that the Anti-Injunction Act prevented suits by a trustee to protect his mortgage interest in property claimed by the Service. See also *Bullock v. Latham*, 306 F.2d 45 (2d Cir. 1962), and *Bartell v. Riddell*, 202 F.Supp. 70 (S.D. Calif. 1962). The right to bring these actions is now set forth in section 7426, which was enacted in 1966 at the same time section 7421(a) was amended to make specific reference to this exception.<sup>12</sup>

The legislative history of section 7421(b) also indicates that the courts and the Congress have not given section 7421(a) an all-inclusive construction. Section 604 of the Revenue Act of 1928, 45 Stat. 873, added the provision now appearing as section 7421(b), which denies courts the right to enjoin the collection of a transferee's liability for taxes of his transferor. It was necessitated by the decision in *Owensboro Ditcher & Grader Co. v. Lucas*, 18 F.2d 798 (W.D. Ky), *appeal dismissed on government's motion*, 22 F.2d 1015 (6th Cir. 1927), which held that the Anti-Injunction Act did not apply to a suit to enjoin the issuance of a restraint warrant against the transferee, but only applied to taxpayers themselves. See H. Rep. No. 2, 70th Cong., 1st Sess. 32 (1927) and S. Rep. No. 960, 70th Cong., 1st Sess. 39 (1928).

In addition, decisions such as that in *McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C. 1972), (three-judge court) and *Green v. Kennedy*, 309 F.Supp. 1127 (D.D.C. 1970), *on final injunction sub nom.*, *Green v. Connally*, 330 F.Supp. 1150, (three-judge court), *aff'd per curiam sub nom.*, *Coit v Green*, 404 U.S. 997 (1971), give further in-

<sup>12</sup>Federal Tax Lien Act of 1966, section 110, 80 Stat. 1142.

dication that there are exceptions to the Anti-Injunction Act which are not described in *Enochs*. As this Court stated in *Standard Nut Margarine*, the terms of section 7421 do not rule out all exceptions in so many words, and the "general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well-established rule [that exceptions to the statute exist]" 284 U.S. at 509.

Finally, even when read literally, section 7421(a) does not apply in this case. The statute applies only to suits "for the purpose of restraining the assessment or collection of any taxes" (emphasis added), and it is clear that the "purpose" of this law suit, as in *Hill*, is not to restrain the assessment or collection of any tax but to challenge the constitutionality of an essentially regulatory Act of Congress and the revocation of an IRS ruling based on that Act. Neither the Courts nor the Congress has ever considered section 7421 to apply to all controversies involving taxes, and we suggest that it does not even literally apply to this case. In particular, we note the contrast between the language of section 7421(a), with its specific mention of purpose, and that employed in the jurisdictional statute, 28 U.S.C. §1340, which refers to cases "arising under any Act of Congress providing for internal revenue." The breadth of that latter section, when compared with section 7421(a), is further indication that the Anti-Injunction Act is not intended to be all-inclusive. See *Bullock v. Latham*, 306 F.2d 45, 47 (2d Cir. 1962).

In short, there is nothing to suggest that the exception set forth in *Enochs* describes the only situation in which injunctive relief may be available, and there are significant opinions of this Court holding to the contrary. As demonstrated in Point I above, the importance to respondent of

obtaining a favorable IRS ruling cannot be overemphasized, and as we shall now show, the alternative remedies suggested by the Government are wholly inadequate to achieve that result.

#### IV.

**THE REMEDIES SUGGESTED BY PETITIONER ARE COMPLETELY INADEQUATE AND THE UNAVAILABILITY OF ANY LEGAL REMEDY COMPELS THE CONCLUSION THAT THE ANTI-INJUNCTION ACT DOES NOT APPLY IN THIS CASE.**

Under petitioner's interpretation of *Enochs*, a plaintiff must show both the inadequacy of his legal remedies and the certainty of success on the merits in order to avoid section 7421. Furthermore, petitioner contends that respondent has an adequate remedy at law either through a refund suit brought by a friendly donor with respect to a deduction denied for a contribution to respondent or one by respondent itself to recover FUTA taxes paid. But, according to petitioner, these remedies will always be available to an organization which has lost its 501(c)(3) status, and thus it necessarily follows that, in petitioner's view, there will never be a case in which a charity can ever meet the tests of *Enochs*. Even were the Commissioner to rule that a particular race or religion was inherently "non-charitable" and hence outside the ambit of sections 170(c)(2) and 501(c)(3), the Government's position would preclude an organization affected by that ruling from obtaining injunctive relief. Quite apart from the advisability or constitutionality of that absolutist position, it is apparent that neither the donor remedy nor the FUTA tax remedy is in any sense adequate. For the following reasons, this Court

should reject petitioner's suggestion that Americans United has an "adequate remedy" in a suit that is brought by another person (a donor) or that raises issues dealing with another tax (FUTA) under another portion of the Code (sections 3301 et seq).

**A. The Donor Remedy Is Wholly Unsatisfactory.**

In both the District Court and the Court of Appeals, the Commissioner placed major reliance for a satisfactory remedy to challenge the ruling revocation on a suit by a donor who made a contribution to Americans United and whose refund claim based on this contribution was not allowed. According to the Government, the donor would then simply challenge the denial of a small contribution, and the issue could be fully litigated. In theory, this is a nice solution; as a practical matter, it is both unfair to respondent and unrealistic.

First, and most important, the donor remedy does not permit Americans United itself to go to court, and thus it must rely on the willingness of someone else to make a contribution and then to litigate the issues for it. Many individuals may be willing to contribute money but not to sue on behalf of a charitable organization. The problem of finding a friendly donor is greatly increased by the fact that a refund can be granted only if the taxpayer establishes both that the charitable deduction should have been allowed and that his return is in other respects correct. Thus, the Commissioner is entitled to conduct a full audit of the donor's return to determine whether there are any additions to income or any deductions which should not have been taken. The right of the Commissioner to open up the entire year for a full audit will persuade most donors not to volunteer to litigate the test case. Moreover, if any offsets in the form of added income or denied deductions are discovered, and

they exceed the amount of the charitable contribution and are upheld by the Court, the donor will not be entitled to a refund even if he prevails on the "test" issue. In such a situation the Commissioner would contend that the charitable deduction issue is "moot", and there would be no adjudication of the "test" issue.<sup>13</sup>

On the generous assumption that a willing donor could be found, there are other pitfalls that may prevent the legal issue of the deductibility of the gift from being litigated. As Commissioner Thrower pointed out,<sup>14</sup> the best path to follow is for the donor to pay the full amount of the tax and simultaneously submit a claim for refund of the tax; after that claim is denied, a suit for refund can be filed in the District Court or Court of Claims. However, there is no certainty that where the sum of money involved is small, the Service will not simply make a refund, either as a final or tentative matter. In fact, a full refund of the tax on a donor's contribution was made in *Mitchell v. Riddell*, 402 F.2d 842, 844 (9th Cir. 1968), *cert. denied*, 394 U.S. 456 (1969), and as a result the "donor remedy" was eliminated. Whether the refund is made intentionally or inadvertently, a real possibility of mooting the case exists when the contributions are small. Of course, as the size of the contribution increases, the likelihood of a refund would decrease, but then so would the likelihood that an individual would be willing to make the contribution on the chance that it may eventually prove deductible.

Assuming a taxpayer can be found who is willing to make the contribution and to take the Service to court, and

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<sup>13</sup> There may also be questions of standing raised as to the right of the donor to assert all of the constitutional rights and interests of the charity.

<sup>14</sup> See p. 10, *supra*.

assuming that the Service does not simply refund the amount claimed during the court proceeding and thereby moot the controversy, and assuming that there are no off-sets that preclude litigation of the issue, there is still an enormous delay involved. An audit on the donor's return, including extensive discovery and examination of his books and records, as well as the litigation of the principal issue, will undoubtedly consume a significant amount of time at the District Court level. Presumably, the Government will take the position that section 7421 would apply even after a victory for the donor in the District Court, so that no injunction could be issued throughout these proceedings. And if any portion of section 501(c)(3) were declared unconstitutional, it seems probable that the Government would attempt to take the case all the way through this Court, thus insuring considerable further delay. Meanwhile, the party with the real interest, Americans United, would be sitting on the sidelines waiting for its ruling and its contributions to return.

It should be apparent that, if the donor remedy were the only remedy, section 7421 would not apply. As this Court said in the *State Railroad Tax Cases* in discussing the operation of R.S. §3224 and the companion refund provisions, they provide a "complete system of corrective justice," 92 U.S. at 613. That statement would clearly be inapplicable if organizations such as Americans United had to rely on the willingness and success of donors in litigating a ruling revocation by the Service.

#### **B. The FUTA Tax Refund Suit Is Not An Adequate Remedy.**

The only taxes that respondent has been required to pay as a result of the revocation of its ruling are FUTA taxes which are payable because the exemption in section



3306(c)(8) which previously applied, covers only organizations qualified under section 501(c)(3). The Government claims that a suit for refund of those FUTA taxes would place in issue the very question which respondent seeks to litigate and thus provides an adequate remedy at law. Respondent does not agree, but before turning to the specific reasons why this remedy is not adequate, the Government's position should be placed in perspective. Respondent is seeking to adjudicate the constitutionality of a statute under which its ruling was revoked by the Internal Revenue Service. The Service claims that a statute written in 1867, as a means of assuring the collection of the revenue, is intended to operate to preclude the bringing of an injunctive action for the relief sought and to relegate respondent to a suit for a refund of FUTA taxes, which is available to it because the exemption in section 3306(c)(8) applies only to 501(c)(3) organizations. Seen in this light, it is easy to appreciate the view of the Court of Appeals that the FUTA tax refund remedy is "so far removed from the mainstream of the action and relief sought as to hardly be considered adequate." (A 36, note 13).

Although Americans United paid FUTA taxes, it is by no means certain that it owed any such taxes even without the exemption of section 3306(c)(8), and it is virtually certain that many other similar organizations do not owe such taxes. The FUTA tax imposed by section 3301 is limited by the definitions of "employer", "wages", and "employment" contained in section 3306. For example, under section 3306(a), an "employer" excludes a person who has paid less than \$1,500 in wages in any calendar quarter, unless that person employed someone for 20 days, each being in a different calendar week during the calendar year,

or the preceding calendar year.<sup>15</sup> The definitions of "wages" and "employment" in sections 3306(b) and 3306(c) also limit further the number of organizations that will be an "employer" because that term is dependent upon the definitions of "wages" and "employment." While no specific definitional exclusion appears to apply to respondent, the existence of these complicated provisions indicates that many charitable organizations will have extreme difficulty in meeting all of the FUTA tests so that a challenge can be made to a ruling revocation.

Assuming an organization wishes to challenge its ruling revocation by a suit for refund of FUTA taxes, enormous problems must still be overcome. Section 7422(a) requires the filing of a claim for refund before a refund action can be brought. Because the FUTA tax is imposed on an annual basis, no refund can be claimed until after the year in which the taxes are paid. Even then section 6532(a) precludes bringing an action until the claim is denied or has gone unanswered for six months. Only then can a suit be filed, after which the Government has another 60 days to answer the complaint. Since most organizations which have had their rulings revoked will have very little money for salaries, the amounts involved are likely to be very small, especially in view of the credit for state employment taxes provided in section 3302, which can go as high as 90% of the federal tax. Section 3302(c)(1). With such small sums involved, the possibility of inadvertent or intentional refunds without adjudication is very real. Moreover, one organization which attempted to litigate its continuing controversy with the Service on its 501(c)(3) status via a refund suit for \$749.04 has met with a tender by the Commissioner of the full \$749.04, plus interest, and a claim that the case

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<sup>15</sup> Prior to the 1970 amendment there had to be four employees on each of the 20 days before any FUTA taxes were payable, regardless of the total wages paid during the year. See 26 U.S.C. §3306(a) (1964).



must be dismissed as moot. The District Court refused to dismiss on mootness grounds, and the case is now *sub judice* in the Ninth Circuit on an appeal by the Government certified under 28 U.S.C. §1292(b). *Church of Scientology of Hawaii v. United States of America*, No. 71-2761. Thus, the Commissioner asserts plenary power to prevent a charity from litigating a legal issue vital to its existence and in that way destroy the remedy which he claims in this Court to be adequate. Contrary to the petitioner's assertion (Br. 35, note 25), this right to make an administrative refund does pose a "real threat" to actions of this kind. While petitioner is correct that "bad faith on the part of Treasury officials . . . should not be presumed" *id.*, the *Church of Scientology* case takes us far beyond any such presumption. See also *Mitchell v. Riddell*, 402 F.2d 842, 844 (9th Cir. 1968), *cert. denied*, 394 U.S. 456 (1969) (donor refund suit mooted) and note 17, *infra*.

If, as seems likely, the Government wishes to avoid litigating the constitutional question, it can take the opportunity of the refund suit to re-examine the activities of the charity to determine whether anything it has done otherwise disqualifies it from section 501(c)(3). This examination would include extensive discovery and may even produce a reason for disqualification that could have been corrected by the charity without loss of its status had it been noted at the administrative level.<sup>16</sup> Thus, there is a real possibility that a particular refund action will be decided without reaching a determination as to the legality of the grounds relied on to revoke the ruling, and the organization would have to return to court to litigate the real issue in another action for other years.

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<sup>16</sup> For a suit in which this kind of detailed factual inquiry and determination was made, see *Krohn v. United States*, 246 F.Supp. 341 (D. Col. 1965).

Even if the charity emerges victorious at the District Court level, the Commissioner would almost certainly argue that section 7421 still precludes the issuance of an injunction because the decision might be reversed on appeal. Therefore, a charity may have hope from a District Court victory, but no contributions. In addition, the Service could decide not to take an appeal for a variety of reasons and still refuse to reinstate the organization's name on its cumulative list.<sup>17</sup> If the Government does appeal, or if the plaintiff loses and appeals, further delay is certain. The progress of the charity which sought to invoke this remedy in *Christian Echos National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *petition for writ of certiorari pending*, No. 72-1378, is illustrative. In *Christian Echos* the ruling was revoked on September 22, 1966, and the case is still not concluded.<sup>18</sup> Thus, regardless of which side emerges victorious in the Court of Appeals, and assuming no remand for further proceedings, the loser is almost certain to attempt to take the case to this Court, thereby creating further delay. During all this time, regard-

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<sup>17</sup> The Government has done virtually that in a Freedom of Information Act situation in which the plaintiff sought Medicaid reports for 13 nursing homes. After the issue was litigated in the District Court with a victory for the plaintiff, the Government determined not to appeal. *Schechter v. Richardson*, (D.D.C., Civ. Action No. 710-72). Thereafter, when the same plaintiff sought additional reports for other nursing homes for other periods, the Social Security Administration refused to turn them over and another litigation was started. This time the case was assigned to a different judge who reached a different conclusion, and now the same plaintiff is in the Court of Appeals almost a year after his first victory in the District Court. See *Schechter v. Weinberger*, No. 73-1797, (D.C. Cir.).

<sup>18</sup> Although procedural complications may have caused some of the delay in *Christian Echos*, those are the sort of problems which must be expected in complex litigation of this kind.

less of whether the charity has been successful in both the District Court and Court of Appeals, presumably the Government would continue to contend that section 7421 applies because of the possibility of ultimate victory for the Service in the Supreme Court. There are few organizations indeed that will be able to withstand this multi-year drought in contributions while awaiting the outcome of a refund suit.

But even a victory in the Supreme Court in the FUTA suit may not be sufficient to insure reinstatement of the prior ruling. Although the Solicitor General suggests that victory in a refund suit is enough, that is not the official position of the Service. Paragraph 270 of the IRS's own Exempt Organization Handbook states its position as follows:

An organization which obtains a tax court or district court decision holding it to be exempt must file an exemption application and establish its right to exemption before the Service will recognize its exemption, for years subsequent to those involved in the court decision.

Since refund suits will always be for prior years, and since contributions will always be sought for subsequent years, it appears to be the Service's position that Americans United will be back where it started even after it wins its hypothetical refund suit in this Court.<sup>19</sup> Thus, it appears that, not only is the FUTA tax refund suit inadequate, it is no remedy at all for the only relief sought by respondent—restoration of its right to receive tax-deductible contributions because the Service will not honor the judgment for future years.

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<sup>19</sup> Petitioner also took this position in *Church of Scientology of Hawaii v. United States of America*, No. 71-2761, brief of appellant, pp. 5, 9-10.

Moreover, the refund suit may be inadequate for other reasons. An adjudication relates only to the qualification of the organization under section 501(c)(3) and the real benefit sought is qualification under section 170(c)(2). This distinction may be crucial since the statutory standards, though quite similar, are not identical. For instance, an organization can meet the test of section 501(c)(3) if it is engaged in "testing for public safety", and yet there is no comparable inclusion in section 170(c)(2). Similarly, a foreign organization can meet the tests of section 501(c)(3), but not those of section 170(c)(2). Furthermore, section 170(c)(2) contains a final proviso that a corporate gift is deductible only if it is to be used within the United States or any of its possessions, a finding which is not required for qualification of an organization under section 501(c)(3). Thus, it is possible that even a Supreme Court decision would not preclude the Service, from asserting that certain of the matters which might prevent qualification under section 170(c)(2) have not been fully adjudicated. In such cases there would be *no* remedy available to litigate the issues, other than a suit by a donor.

In fact, there are four separate kinds of organizations which are eligible to receive tax deductible contributions under section 170(c) and which have *no* FUTA tax refund remedy under current law. The first of these is the charitable trust, which is included under section 170(c)(2) but which may not pay any income taxes as a result of the operation of section 642(c) and not be exempt under section 501(c)(3). Since the exclusion for FUTA taxes in section 3306(c)(8) applies only to 501(c)(3) organizations, the FUTA tax remedy is not available for charitable trusts although it is for charitable corporations. The distinction between a charity operating in trust form, and one operating in a corporate form, is doubtless meaningful in some situations

and may be dictated by state law, but it hardly makes sense to draw a distinction for purposes of section 7421 based upon that difference.

Under section 170(c)(3) contributions to certain veterans organizations are tax deductible, but those organizations do not qualify under section 501(c)(3) and hence would have no FUTA tax remedy available should they lose their status under section 170(c)(3).<sup>20</sup> Another similar case involves domestic fraternal societies to which contributions are deductible under section 170(c)(4), and which are exempt from income taxation under section 501(c)(10). Finally, cemetery companies described in section 170(c)(5) are also eligible to receive tax deductible contributions, and their income tax exemption is based on section 501(c)(13).

In each of these cases the allegedly adequate remedy of a FUTA tax refund suit is not available.<sup>21</sup> If petitioner's position is correct, these organizations would have no remedy for themselves and could only hope that a friendly donor might save them. We submit that extending section 7421 to those situations would present the most grave constitutional questions<sup>22</sup>, and thus it seems highly unlikely

<sup>20</sup> Certain veterans groups are exempt from income taxes under section 501(c)(19), enacted in 1972. Others may qualify as social welfare organizations under section 501(c)(4) or as social clubs under section 501(c)(7).

<sup>21</sup> No refund suit for social security taxes would be available either since the exemption in section 3121(b)(8)(B), like that for FUTA taxes in section 3306(c)(8), applies only to 501(c)(3) organizations.

<sup>22</sup> As the Court pointed out in *Botta v. Scanlon*, 288 F.2d 504, 506 (2d. Cir. 1962), the Fifth Amendment's proscription against taking property without due process of law might well operate to preclude the application of section 7421 in such circumstances. See also the dissenting opinion in *Bob Jones University v. Connally*, 472 F.2d 903, 909 (4th Cir. 1973), rehearing denied, 476 F.2d 259, petition for writ of certiorari pending, No. 72-1470.



that it would be held to cover those cases. If other types of organizations which have no FUTA tax remedy would not be barred by section 7421, it makes no sense to distinguish for these purposes between those that theoretically have the FUTA tax remedy available and those that do not. There is nothing to suggest that the Congress which enacted the predecessor of section 7421 in 1867, or any subsequent Congress, had any reason to distinguish between these two groups of organizations for purposes of section 7421. Therefore, rather than requiring the courts to make a detailed examination in every case to determine whether there is a FUTA tax remedy available, a determination which may only be possible after trials and appeals, it is far more sensible to exempt from the operation of section 7421 all those cases in which the only available remedy is the possibility of a FUTA or a donor's refund suit.

But even if Americans United were successfully to prosecute its refund suit and to secure a refund of every penny of FUTA taxes that it paid, plus interest, that remedy is in no way adequate. Indeed a refund of those taxes is basically irrelevant to Americans United's problem. What cannot be refunded are the lost contributions beginning in April 1969 and continuing to the final date that the Supreme Court upholds the taxpayers' position.<sup>23</sup> There is no refund suit available for lost contributions, either against the United States or against the unknown contributors who have decided to keep their money or to put it to other charitable uses. On the other hand, the right to challenge the ruling revocation by an immediate injunctive action at least holds open the possibility that interim relief will

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<sup>23</sup> That, of course, assumes that the Service does not claim that new facts have come to light for years not at issue in the refund suit that now make it impossible to allow a deduction under section 170(c)(2) even though the refund suit was successful. See p. 34, *supra*.

assure that contributions will continue until the dispute is resolved. Where an injunction is sought merely against the collection of taxes, the ultimate recovery of those taxes makes a refund suit adequate, see *Snyder v. Marks*, 109 U.S. 189, 193 (1883), and yet it is apparent that a recovery of the FUTA taxes paid will be of virtually no significance to Americans United and will not be able to compensate it for the loss of donations.

In other situations in which 7421 is a bar, the plaintiff has available a remedy that is fully adequate. Thus, since income taxes can be contested without payment by petitioning the Tax Court, see section 6213(a), they present no problem even where assessments are extremely large. Liability for FUTA and social security taxes, where those are the real issues in the case, can be contested by payment for a single employee and, for social security taxes, for a single quarter. See *Steele v. United States*, 280 F.2d 89 (8th Cir. 1960). Therefore, the taxpayer's predictions of bankruptcy in *Enochs*, 370 U.S. at 5, were premised on an erroneous understanding of the tax laws since according to the Government's brief in this Court (p. 9), a payment of only \$2,000 would have permitted the taxpayer to litigate the entire controversy. Even gambling and other excise taxes, where full payment may be prohibitive, can be contested on a single transaction basis. *Vuin v. Burton*, 327 F.2d 967 (6th Cir. 1964). Therefore, a taxpayer who is even moderately careful can insure that no matter how large the assessment, there is a procedural device by which it can be contested without first paying the full amount claimed.<sup>24</sup>

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<sup>24</sup> The validity of the remainder of the tax would be raised by way of a counterclaim by the Government. In order to protect its claim, the Government may require the taxpayer to agree to extend the statutes of limitation on assessment and collection, but it will not normally commence collection activities unless there is a real likelihood that the taxpayer will dissipate his assets in the interim.

That is simply not the case in this situation. The remedy of a FUTA tax refund suit is really beside the point because it cannot recover what is really at issue—the loss of contributions both past and future. As Judge Tamm found, there is no “meaningful alternate form of relief” (A 38), or in the language of this Court in the *State Railroad Tax Cases*, 92 U.S. at 613, the “complete system of corrective justice” does not exist. For this reason alone, this case is distinguishable from every other action in which it has been held that section 7421 applies and, accordingly, this Court should hold that section 7421 does not preclude injunctive relief here.

Since the Service implicitly concedes that respondent must be afforded a means to litigate its contentions, there is no reason to require the circular and inadequate route of a FUTA tax refund suit, rather than permitting a direct and certain challenge in the District Court. Furthermore if a refund suit is required the Government will lose the advantage of a three-judge court which, as the Court below recognized, is intended to guard against “impolitic action on the part of lone federal district judges in matters of broad regulatory scope. . .” (A 28).

In sum, we submit that section 7421 was never intended and should not be held to apply to attempts by charitable organizations to challenge adverse rulings by the Internal Revenue Service. There were no such organizations in 1867, and there is not the slightest indication of any congressional consideration of section 7421 in the light of this situation. There is every reason to except this type of action from section 7421, and no reason to include it. The claim of “protection of the revenue” is simply inapplicable and is wholly inappropriate in the absence of any system of “corrective justice” which is so badly needed in these types of cases. There is no other plain, speedy,



adequate, and complete remedy at law available for Americans United and other similarly situated organizations. For this reason, as well as for the others set forth above, this Court should hold that section 7421 is inapplicable in this case.

### **V. The Doctrine Of Sovereign Immunity Is Inapplicable In This Case.**

In a further effort to prevent respondent from meaningfully challenging the ruling revocation, petitioner raises the specter of sovereign immunity as a bar to the maintenance of this action. Petitioner's brief advances the doctrine of sovereign immunity without so much as even a mention of the three statutes which provide subject matter jurisdiction in this case—section 10 of the Administrative Procedure Act, 5 U.S.C. §§701-706, 28 U.S.C. §1331 (the general federal question jurisdictional statute), and 28 U.S.C. §1340 (the jurisdictional statute for controversies arising under the Internal Revenue laws).

Nor does petitioner dispute the inapplicability of sovereign immunity when it is alleged that a Government officer has exceeded the scope of his authority or is acting pursuant to an unconstitutional statute. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-691 (1949), and *Dugan v. Rank*, 372 U.S. 609, 621-622 (1963). However, seizing on a footnote in *Larson*—and elevating it to the status of a holding—petitioner contends that sovereign immunity applies in this case because the complaint seeks affirmative relief (Br. 46).<sup>25</sup> In doing so, petitioner focuses solely on one aspect of the relief sought,

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<sup>25</sup> One court has recently referred to the passage relied on by petitioner as "controversial dictum." *State Highway Comm. v. Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973).

i.e., the reinstatement of the prior ruling. He neglects to point out that paragraphs 1,3 and 5 of the prayer for relief do not require any such affirmative action and that paragraph 4 asks only for a reopening in the light of the final decision in this case (A 16), hardly the kind of affirmative action which sovereign immunity was intended to preclude. Moreover, we respectfully submit that in the event of a refusal of the Commissioner to reinstate respondent's ruling after an ultimate victory on the merits in this case, it is clear that mandamus relief under 28 U.S.C. §1361 would be appropriate. Although the Commissioner is not required to issue rulings at all, having done so for other taxpayers he cannot arbitrarily refuse to do so for Americans United.

Other aspects of petitioner's assertion of sovereign immunity in this case are inconsistent with other positions he has taken. Petitioner has steadfastly insisted that respondent can obtain all of the relief that it desires if only it would commence a refund action for the FUTA taxes. If victorious in that action, the Commissioner suggests, respondent's favorable status would be regained and presumably the affirmative relief of reinstatement on the Commissioner's cumulative list would also be available.<sup>26</sup> Yet in this proceeding, petitioner continues to maintain that, although an adequate remedy is available by the refund suit method, the same relief is barred here by the doctrine of sovereign immunity.

Furthermore, petitioner has asserted in response to the petition for certiorari in *Bob Jones University v. Connally*, No. 72-1470, that the decision there is in "direct conflict" with this case. Memorandum for Respondent, p. 4. Yet neither in the Court of Appeals nor in this Court, has the

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<sup>26</sup> But see page 34 *supra*.

Commissioner asserted that sovereign immunity is a bar to judicial review in *Bob Jones*.<sup>27</sup> The only distinction between *Bob Jones* and this situation is that the Service revoked the ruling of Americans United before it could go to court, whereas *Bob Jones* was able to file suit prior to the issuance of the ruling revocation. Surely, the applicability of the doctrine of sovereign immunity cannot depend upon these factual distinctions; such a rule would only create a race between an aggrieved charity and the Service in order to decide the question of sovereign immunity.

Finally, nothing in *Louisiana v. McAdoo*, 234 U.S. 627 (1914), supports petitioner. Although that decision contains language indicative of a concern with sovereign immunity, it is, we submit, a decision relating primarily to standing since the plaintiff there was complaining about the inadequate tariffs which the Secretary of Treasury had imposed on Cuban sugar in competition with sugar which the plaintiff manufactured. Moreover, even as a competitor standing case, its validity is in serious doubt since this Court's decisions in such cases as *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

Neither precedent nor reason support the assertion of sovereign immunity in this case, and petitioner's contention to the contrary should be dismissed.

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<sup>27</sup> In his petition in the instant case, the Commissioner took the position that the decision below was in conflict with *Bob Jones* and that any differences were "immaterial." Petition for Writ of Certiorari, pp. 9-10 and note 3.

## VI.

**THE COMPLAINT RAISES SUBSTANTIAL  
CONSTITUTIONAL QUESTIONS REQUIR-  
ING THE CONVENING OF A THREE-  
JUDGE COURT.**

Petitioner further contends that there is no constitutional question raised in this action which requires the convening of a three-judge court.<sup>28</sup> A discussion of that issue must begin with the proper standard for convening a three-judge court, *i.e.*, whether the complaint raises a "substantial" constitutional question. See *Idlewood Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962). A case raises a "substantial" constitutional question unless the issue is foreclosed by prior decisions of this Court or is obviously without merit. *California Water Service Co. v. City of Redding*, 304 U.S. 252, 255 (1938). Just last term, this Court restated the rule for determining substantiality, holding that a claim is "constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous. . . ." *Goosby v. Osser*, 409 U.S. 512, 518 (1973). It is clear that under *Goosby* the substantiality test is easily met by respondent.<sup>29</sup>

The sole decisions of this Court relied upon by petitioner are *Cammarano v. United States*, 358 U.S. 498

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<sup>28</sup> This issue was not presented in the petition and in our view is not "fairly comprised" within the question presented as required by Rule 23, 1(c) of this Court. See Response to Petition for Writ of Certiorari, p. 7, note 2.

<sup>29</sup> For a detailed discussion of the constitutional issues presented, see T. A. Troyer, *Charities, Law-Making and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. Tax Institute 1415 (1973).

(1959) and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). In *Cammarano* this Court upheld IRS regulations which denied deductions for businesses for those expenses incurred in attempting to influence legislation. The claim of unconstitutional abridgment of a First Amendment right to petition the Government was rejected by the Court primarily on its finding that Congress decided that "everyone in the community should stand on the same footing as regards [the deductibility of lobbying expenses] as far as the Treasury of the United States is concerned" 358 U.S. at 513. See also *Slee v. Commissioner*, 42 F.2d 184, 185 (2d Cir. 1930). Since respondent's basic point is that the "same footing" premise upon which *Cammarano* was founded does not exist in this case, it is apparent that *Cammarano* does not "inescapably render [these] claims frivolous."

Similarly, the decision of this Court in the *San Antonio School District* case is by no means dispositive of the claims here. In *San Antonio* this Court held that alleged discriminations in education based upon disparities in the amount of state financial aid available did not constitute an improper discrimination under the Fourteenth Amendment. In reaching that result, this Court specifically refused to classify the right to education at issue as a "fundamental right" which would have required a strict standard of review, *id.* at 37, noting that it was not one of the enumerated rights in the Bill of Rights. *Id.* at 35. By way of contrast, the rights asserted here—freedom of speech and association and the right to petition the Government—are specifically included in the First Amendment, and hence *San Antonio* is distinguishable. Therefore, the discrimination between wealthy and poor organizations alleged here must be tested under the strict standard of judicial review found not to be applicable in *San Antonio*.

There are other constitutional questions presented which are also substantial enough to require the convening of a three-judge court. Respondent's allegation that the anti-lobbying proscriptions violate its First Amendment rights by imposing an unconstitutional penalty for exercising them, see *Speiser v. Randall*, 357 U.S. 513 (1958), is not foreclosed by *Cammarano*. *Cammarano* dealt solely with the denial of deductions for lobbying activities, and not with the entire loss of a favorable tax status for engaging in such activities. Mr. Justice Douglas in his concurring opinion in *Cammarano* specifically noted this distinction when he indicated that, if Congress had denied all deductions (and not merely those for lobbying) on the ground that the taxpayer had engaged in lobbying activities, then it would place a penalty on the exercise of First Amendment rights which could not withstand a constitutional challenge under *Speiser*, *supra*. See 358 U.S. at 515. Since the penalty which was not present in *Cammarano* is present in this case, *Cammarano* does not control, and a substantial constitutional question is presented.

Respondent's complaint also alleges that the terms "substantiality" and "propaganda" are so lacking in specificity that they fail to pass constitutional muster (A 15). This issue was not before this Court in *Cammarano* and is not disposed of in any decision of this Court, particularly in light of the harsh penalty which is exacted for overstepping the vague statutory boundaries.<sup>30</sup>

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<sup>30</sup>The Service's own Exempt Organization Handbook does little to clarify the matter. See paragraphs 764(1): "There is no simple rule as to what amount of activities is substantial. The one case on this subject is of very limited help." and (2) "The central problem is more often one of characterizing the various activities as attempts to influence legislation." The Handbook is intended to be used by Service employees as a guide in processing ruling applications and in conducting audits.



Moreover, the restrictions on lobbying deny respondent equal protection of the laws under the Fifth Amendment in view of the fact that other similarly situated organizations, such as war veterans groups, domestic fraternal organizations, and certain cemeteries, are entitled to receive tax-deductible contributions under other provisions of section 170(c) and are not limited in any way in their legislative activities, as charitable organizations such as Americans United are. Because of the importance of First Amendment rights, this legislative classification will require the strictest scrutiny in determining whether a rational basis for it exists. See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1968).

Although in our view the substantiality issue is not before this Court, it is nonetheless apparent that the issues presented by respondent more than meet the requirements for the convening of a three-judge court.

### CONCLUSION

The Commissioner has approached this case as though it were purely a tax case and the essential concern was protection of the revenue. Far more than that is involved, however, since what respondent seeks for itself and for other charitable and educational institutions is the right to go to court in a meaningful action when its very existence is at stake. The alternate remedies of refund suits by a friendly donor to challenge a denied deduction, or by respondent to recover FUTA taxes, are wholly inadequate to protect the real right at issue—the right to continue to receive tax-deductible contributions which are a necessity if the organization is to maintain its operations. Respondent has sought to challenge petitioner's revocation of the ruling which it had for almost twenty years and has claimed that its constitutional rights have been denied by the ac-

tions of petitioner. Nothing in section 7421 suggests, let alone compels, that respondent seek redress for the denial of its constitutional rights in a manner other than the one it has chosen in this case. The Court of Appeals correctly held that charitable organizations, engaged in activities protected by the First Amendment's guarantees of freedom of speech and association, may bring direct actions in the district courts when the Commissioner takes action against them which undercuts their very existence by denying them the right to receive tax-deductible contributions. Accordingly, the decision of the Court of Appeals should be affirmed, and a three-judge court convened immediately to consider respondent's challenge on the merits.

Respectfully submitted,

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September 26, 1973



**APPENDIX**

Internal Revenue Code of 1954, as amended, 26 U.S.C. Section 170

(c) For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

\* \* \*

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

(3) A post or organization of war veterans, or an auxiliary unit or society of, or trust or foundation for, any such post or organization—

(A) organized in the United States or any of its possessions, and

(B) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(4) In the case of a contribution or gift by an individual, a domestic fraternal society, order, or association, operating under the lodge system, but only if such contribution or gift is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

(5) A cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual.

\* \* \*

#### Section 501

(c) The following organizations are referred to in subsection (a):

\* \* \*

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

\* \* \*

(7) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder.

\* \* \*

(10) Domestic fraternal societies, orders, or associations, operating under the lodge system—

(A) the net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational, and fraternal purposes, and

(B) which do not provide for the payment of life, sick, accident, or other benefits.

\* \* \*

(13) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

\* \* \*

(19) A post or organization of war veterans, or an auxiliary unit or society of, or a trust or foundation for,

any such post or organization—

(A) organized in the United States or any of its possessions,

(B) at least 75 percent of the members of which are war veterans and substantially all of the other members of which are individuals who are veterans (but not war veterans), or are cadets, or are spouses, widows, or widowers of war veterans or such individuals, and

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Section 3306

(c) For purposes of this chapter, the term "employment" means any service

\* \* \*

except—

\* \* \*

(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

\* \* \*

Section 7421

(a) Except as provided in section 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (31 U.S.C. 192) in respect of any such tax.

**Declaratory Judgement Act, as amended, 28 U.S.C. §2201,**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

**Jurisdictional Statutes**

**28U.S.C. §1331**

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

\* \* \*

**28 U.S.C. §1340**

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

**5 U.S.C. §§701-706, Section 10, Administrative Procedure Act, as amended**

**§701**

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

\* \* \*

**§702**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

**§703**

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

**§704**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

\* \* \*

**§705**

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

## §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

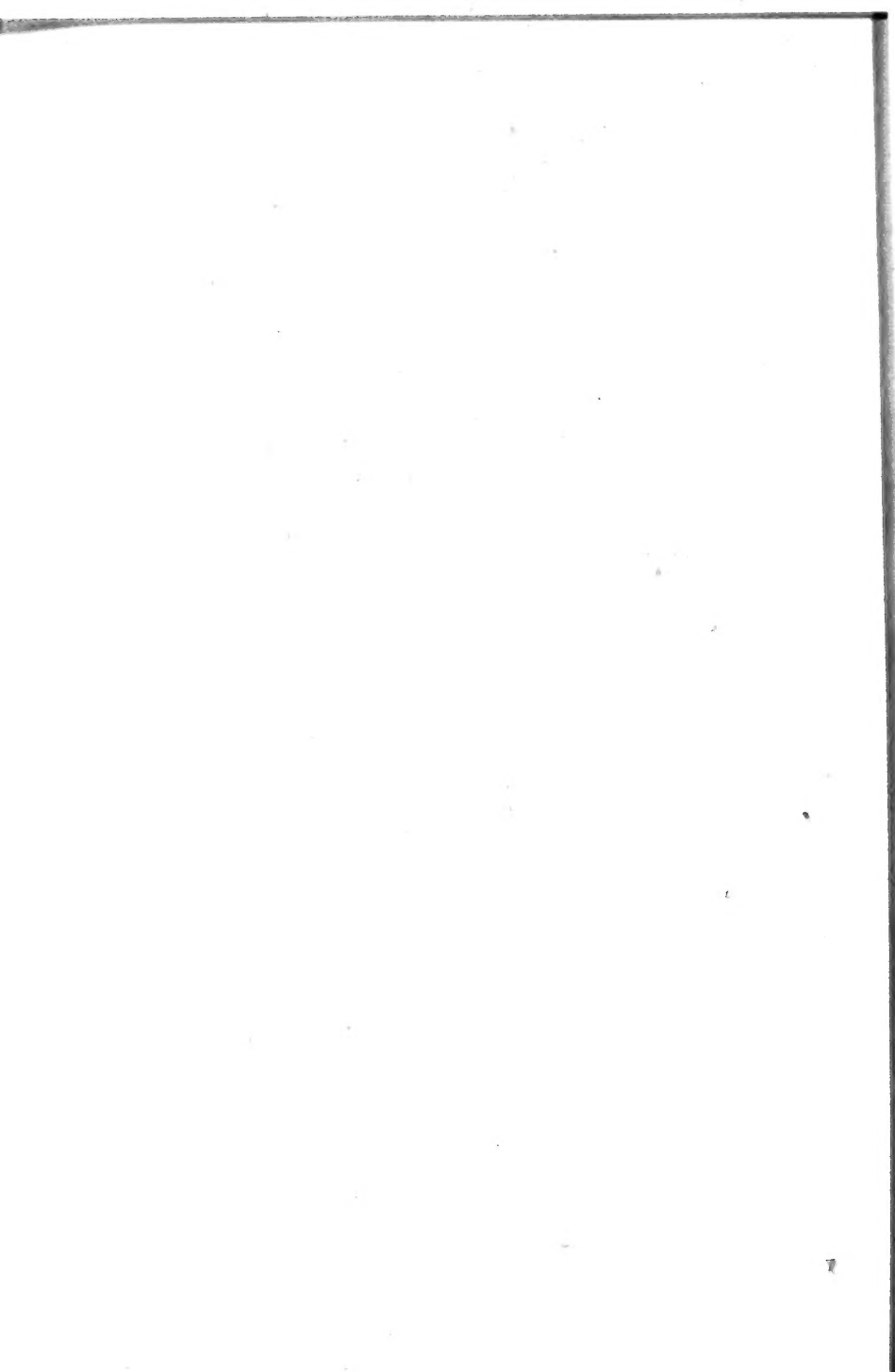
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

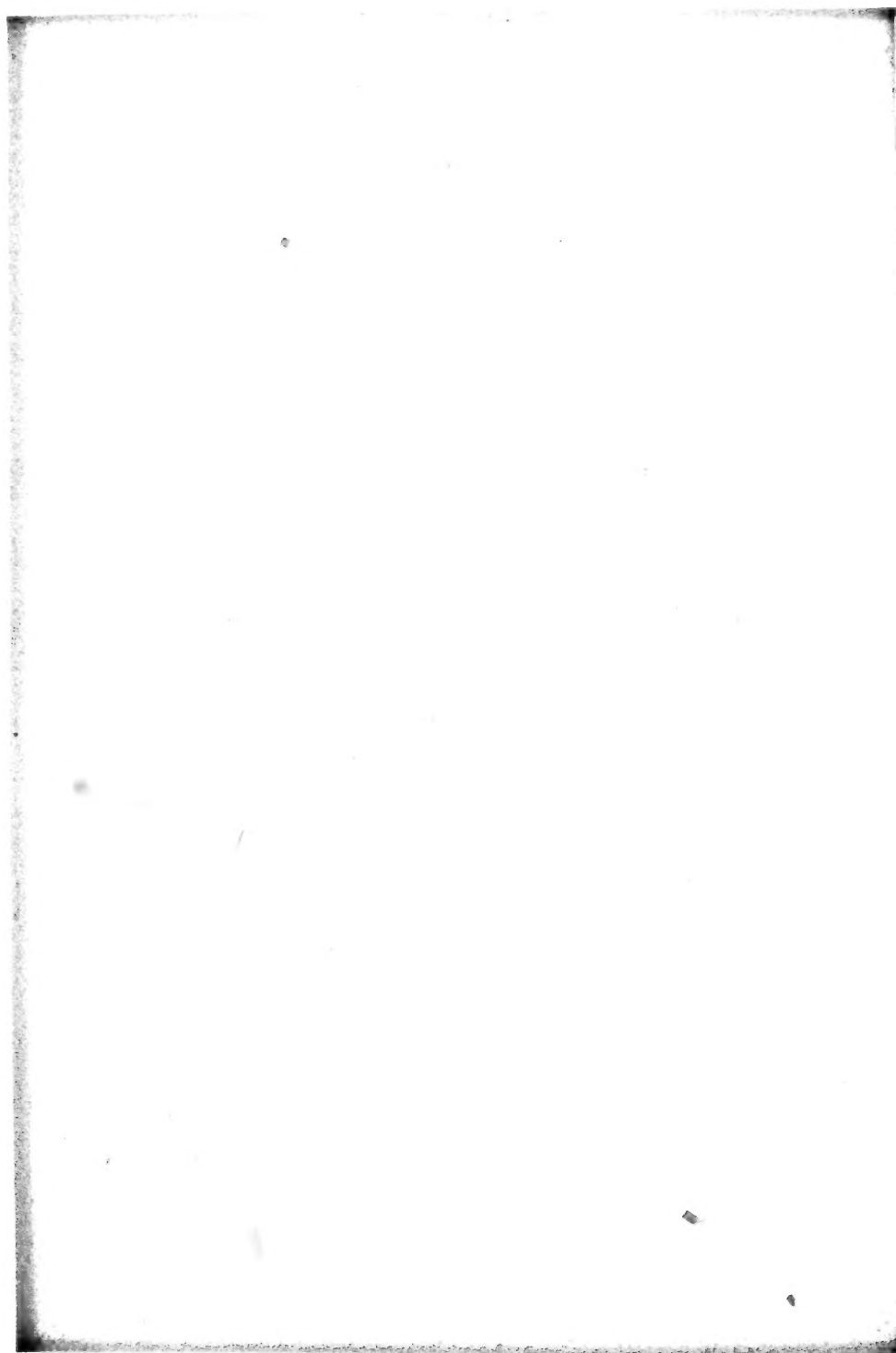
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.







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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1973

No. 72-1371

DONALD C. ALEXANDER,  
Commissioner of Internal Revenue, *Petitioner*

v.

“AMERICANS UNITED” INC., *et al.*, *Respondent*

On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit

---

**STATEMENT OF AND BRIEF FOR  
COUNCIL ON FOUNDATIONS, INC.,  
NATIONAL ASSOCIATION FOR MENTAL  
HEALTH, INC.,  
AMERICAN COUNCIL ON EDUCATION  
AMERICAN JEWISH COMMITTEE  
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**AMERICAN JEWISH COMMITTEE**  
**AS AMICI CURIAE**

---

The attached brief is filed by consent of the petitioner and the respondent, on behalf of the Council on Foundations, Inc., the National Association for Mental Health, Inc., the American Council on Education, and the American Jewish Committee, as *amici curiae*.

*Amicus curiae* Council on Foundations, Inc. is a national nonprofit membership corporation organized

to assist foundations in accomplishing their philanthropic objectives. The Council has more than 600 member foundations, which hold more than one-half of all foundation assets in the United States. The Council and its member foundations have all been ruled by the Internal Revenue Service to be exempt from federal income tax pursuant to sections 501(a) and 501(c)(3) of the Internal Revenue Code of 1954.<sup>1</sup> The vast majority of grants made by the Council's member foundations are to organizations ruled exempt from federal income tax pursuant to these same Code sections.

*Amicus curiae* National Association for Mental Health, Inc. is a national nonprofit membership corporation organized for the exclusive purpose of fostering better understanding and treatment of mental illness within the United States. The Association has more than one million members and is comprised of more than 800 affiliated mental health organizations which carry on programs of community education and social action. The Association and all of its affiliates have been ruled by the Revenue Service to be exempt from federal income tax pursuant to sections 501(a) and 501(c)(3). They are dependent upon charitable contributions to finance their operations.

*Amicus curiae* American Council on Education is a national nonprofit membership corporation organized as a center of cooperation and coordination for the improvement of education at all levels, with special emphasis on higher education. The membership of the American Council includes 69 percent of the public,

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<sup>1</sup> Unless otherwise stated, all statutory references are to the Internal Revenue Code of 1954, as amended, which is Title 26 of the United States Code.

and 80 percent of the private, nonprofit accredited institutions of higher education in the United States. Virtually all of the American Council's private member institutions of higher education and some of its public member institutions have been ruled exempt from federal income tax under section 501(a) as organizations described in section 501(c)(3). Virtually all of the public member institutions receive substantial financial support from section 501(c)(3) entities directly associated with them. The American Council's member institutions depend upon charitable contributions from individuals and corporations for a substantial portion of their overall financial support.

*Amicus curiae* American Jewish Committee is a national nonprofit membership corporation founded in 1906. Although the chief purpose of this organization is to prevent the violation of civil and religious rights of American Jews, it has from its very inception been devoted to the attainment of civil and religious liberty for all Americans. The Committee has been ruled exempt from federal income tax pursuant to sections 501(a) and 501(c)(3). It has approximately 40,000 members and is dependent upon charitable contributions from individuals and corporations for a substantial part of its operations.

*Amici curiae* are filing the attached brief because they believe in principle that Internal Revenue Service rulings relating to the qualification of charitable organizations under sections 501(c)(3) and 170(c)(2) should be subject to adequate judicial review. They believe the denial of review in this case would be tantamount to denying any adequate review and would constitute a serious threat to philanthropic or-

ganizations. *Amici* believe the need for adequate review is imperative where, as in this case, important questions regarding charities' First Amendment rights are presented. Accordingly, *amici* support the position of respondent, and contend that the decision of the Court of Appeals should be affirmed.

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**AMERICAN JEWISH COMMITTEE**  
**AS AMICI CURIAE**

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**INTRODUCTION: THE STATUTORY SCHEME**

Tax laws are of critical importance to charities in this country. The Internal Revenue Code reflects a congressional design to employ special tax provisions to encourage socially beneficial actions through pri-

vate philanthropy.<sup>1</sup> As a practical matter, these special provisions determine both the scope and the nature of charitable activity. This case concerns the relationship of these special tax provisions and the so-called letter ruling program, whereby the Internal Revenue Service issues rulings stating its views on the tax consequences of proposed transactions.<sup>2</sup>

Section 501(a) of the Code<sup>3</sup> provides exemption from federal income tax for, *inter alia*, the organizations described in section 501(c)(3):

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . .

Section 170(a) provides for a deduction from federal income tax for contributions to the organizations described in section 170(c)(2). With certain minor exceptions, these are the same organizations described in section 501(c)(3).<sup>4</sup> Sections 2055(a)(2) and

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<sup>1</sup> See, *e.g.*, Treasury Department Report on Private Foundations, submitted to the Committee on Finance, United States Senate, 89th Cong., 1st Sess. 12-13 (Comm. Print 1965).

<sup>2</sup> See generally Rev. Proc. 72-3, 1972-1 C.B. 698.

<sup>3</sup> All statutory references are to the Internal Revenue Code of 1954, as amended.

<sup>4</sup> The exceptions are foreign organizations and organizations engaged in "testing for public safety," which qualify as exempt under section 501(c)(3) but not for eligibility to receive deductible charitable contributions under section 170(c)(2).

2522(a)(2), also substantially the same as section 501(c)(3), provide for deductions under, respectively, the federal estate and gift tax laws.

The Service's letter ruling program is not specifically authorized in the Code. It is based on the general mandate of section 7805(a) to the Commissioner of Internal Revenue to "prescribe all needful rules and regulations" for the enforcement of the Code.<sup>5</sup>

The program has had a unique impact in the area of the tax law pertaining to charities. For many years the Revenue Service has made available a printed "Form 1023," which "is to be used to apply for a ruling and determination in recognition of an organization's exempt status under section 501(c)(3)."<sup>6</sup> And the Tax Reform Act of 1969 gave indirect approval to the rulings program in this area by adding section 508(a) to the Code, under which a new organization seeking to operate under section 501(c)(3) must give "notice to the Secretary or his delegate, in such manner as the Secretary or his delegate may by regulations prescribe, that it is applying for recognition of such status." Treasury Regulation section 1.508-1(a)(2)(i), interpreting this provision, states that section 508(a) notice is to be given by the filing of a "Form 1023, exemption application." Thus, under present law a new organization cannot qualify under section 501(c)(3) unless it has at least requested a letter ruling.

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<sup>5</sup> The program was initiated by the Service in 1940, for reasons of administrative necessity, and was formally announced in 1953 by Revenue Ruling 10, 1953-1 C.B. 488. See generally Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, N.Y.U. 20th Ann. Inst. on Fed. Tax. 1 (1962).

<sup>6</sup> Internal Revenue Service, Instructions for Form 1023, paragraph A (Revised Nov. 1972).

In addition, the rulings program is critical for appearance on what amounts to the official Revenue Service list of charitable organizations, Publication No. 78, *Cumulative List of Organizations described in section 170(c) of the Internal Revenue Code of 1954*. Inclusion in the *Cumulative List* signifies that an organization "has received a ruling or determination letter . . . stating that contributions by donors to the organization are deductible as provided in section 170 of the Code."<sup>7</sup> Revenue Procedure 72-39, 1972-2 C.B. 818, superseding Revenue Procedure 68-17, 1968-1 C.B. 806. The Service holds that donors can rely upon the *Cumulative List* in making contributions, and that with certain exceptions gifts to a listed organization prior to announcement by the Service that contributions are no longer deductible will be treated as deductible under section 170, irrespective of the organization's actual status.<sup>8</sup> This "advance assurance of deductibility" to prospective donors represents a departure from the Service's general position that "a taxpayer may not rely on an advance ruling issued to another taxpayer." Revenue Ruling 72-3, 1972-1 C.B. 698, 705. The assurance does not apply to organizations which do not appear in the *Cumulative List*, even if they hold rulings from the Service recognizing their section 170(c)(2) eligibility. Revenue Procedure 72-39, *supra*.

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<sup>7</sup> The *Cumulative List* is kept current by the periodic publication of supplements and announcements reflecting new rulings, revocations, and terminations.

<sup>8</sup> The exceptions are "where the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for, or was aware of, the activities or deficiencies on the part of the organization that gave rise to the loss of qualification." Rev. Proc. 72-39, 1972-2 C.B. 818.

## ARGUMENT

### I. AS A PRACTICAL MATTER MANY CHARITABLE ORGANIZATIONS MUST HAVE A RULING IN ORDER TO RAISE FUNDS AND OPERATE

The court below noted the critical importance of the Service's letter ruling program for charitable organizations:

Because of the "tax breaks" attendant to contributions to corporations qualifying under § 170(c) of the Code, qualification thereunder is a precious possession and removal from the Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954 is a damaging—sometimes fatal—injury to the financial status of any "charitable" organization. Potential contributors with a minimum of business acumen are careful to get the most for their contributed dollar, and one certain way not to do so is to contribute to non-§ 170 corporations. 477 F.2d at 1177.

This statement goes to the heart of the practical problem encountered by many organizations of the types specified in sections 501(c)(3) and 170(c)(2). A great many such organizations have little gross income and no net or taxable income, and are therefore basically unaffected by the section 501(c)(3) exemption from tax. But they must depend upon contributions to finance their operations, and it is of extreme importance to them that they qualify under section 170(c)(2) as eligible to receive deductible contributions.<sup>9</sup>

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<sup>9</sup> Rulings on section 170(c)(2) eligibility are commonly issued in response to Form 1023 requests for rulings on exempt status under section 501(c)(3). Eligibility to receive deductions under the federal gift and estate tax laws is also normally covered in such rulings. See Department of the Treasury, Internal Revenue Manual, Part XI, Chapter (11) 671, *Exempt Organizations Handbook* ¶¶ 130(2)(b); 130(2)(d); Exhibit 200-10.

Individuals and corporations not exempt from federal income tax generally wish to minimize the cost of their charitable donations, and to do this they must qualify each donation as a deductible "charitable contribution" under section 170(c)(2). If a donation does not so qualify, it will not support a deduction from gross income and the full amount of the donation will have to be made by the donor in after-tax dollars. Therefore, prospective donors who are subject to tax customarily request assurance, when solicited for donations, that the donee falls within the provisions of section 170(c)(2).<sup>10</sup>

In the case of prospective donor organizations which are themselves exempt from federal income tax, assurance is generally sought that the requested donation will at least qualify as being for a purpose specified in section 170(c)(2)(B)—that is, "religious, charitable, scientific, literary, or educational purposes or . . . the prevention of cruelty to children or animals." Organizations exempt under section 501(c)(3) desire this assurance because a donation for purposes other than those specified in section 170(c)(2)(B) might raise a question whether the donor organization was operating "exclusively," as section 501(c)(3) requires, for the purposes specified in that section. In the case of private foundations,<sup>11</sup> which are an important source of support for many charities, assurance is strictly required by reason of the provisions of section 4945,

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<sup>10</sup> For the same reason, charitable solicitation material addressed to small donors generally includes a representation by the soliciting organization that it is eligible to receive deductible contributions.

<sup>11</sup> The term "private foundation" is defined in section 509(a). Essentially, it includes all organizations within section 501(c)(3) other than specified classes of public charities, such as churches, schools, and hospitals.



which imposes heavy penalty taxes on such organizations for "taxable expenditures," a term which includes any amount paid or incurred "for any purpose other than one specified in section 170(c)(2)(B)." Normally, qualification for exempt status under section 501(c)(3) will imply the needed qualification under section 170(c)(2)(B).<sup>12</sup>

As a practical matter, the only way to provide prospective donors with the type of assurance they require is for the soliciting organization to show that it is included in the *Cumulative List* or to produce a letter ruling from the Service recognizing its eligibility to receive deductible charitable contributions under section 170(c)(2). Prospective donors of all types generally insist upon such Service-sanctioned evidence of charitable status,<sup>13</sup> and the Internal Revenue Service has recognized this. As Randolph W. Thrower, speaking as Commissioner of Internal Revenue, noted:

Even before the Tax Reform Act [of 1969], a ruling from the Internal Revenue Service was,

<sup>12</sup> An examination by *amicus* Council on Foundations, Inc. of recently published foundation annual reports extracted in Volume 1 of The Foundation's Center's 1972-73 *Information Quarterly* revealed that all of the 70 foundations discussing standards for approving grant applications required prospective organizational grantees to establish exempt status under section 501(c)(3).

<sup>13</sup> See, e.g., Parker, *Relations with the Internal Revenue Service: Exemption Application, Rulings, and Audits*, N.Y.U. Proceedings of the 9th Bien. Conf. on Charitable Foundations 223-24 (1969):

Probably the most immediate benefits of obtaining such a ruling are exemption from taxes on the organization's income and a listing in the Treasury Department's *Cumulative List of Organizations Contributions to Which are Deductible*. Listing in this publication . . . is most important for charities. Without it, it is virtually impossible to obtain contributions.

Such evidence is also customarily regarded as a prerequisite for the representations to small donors referred to in n. 10, *supra*.

generally speaking, the sine qua non for solicitation of charitable contributions and foundation support. . . . [W]e know that our denial of exemption, or even our refusal to rule on the organization's qualifications, may doom the organization.<sup>14</sup>

Obviously the revocation of a letter ruling, as occurred in this case, strikes a heavy blow at an organization seeking to pursue the purposes specified in sections 501(c)(3) and 170(c)(2). Revocation means that the organization can no longer provide prospective donors with the assurance which is generally necessary for the obtaining of funds. In many cases, particularly where the organization has not achieved widespread recognition, the inability to provide such assurance will mean a sharp drop in the organization's funds, a curtailment of the organization's activities, and even a termination of the organization's existence.<sup>15</sup>

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<sup>14</sup> Remarks by Randolph W. Thrower, Commissioner of Internal Revenue, Southwest Legal Foundation, Dallas, Texas, January 15, 1971, p. 3. [Hereinafter cited as "Thrower Remarks"] These remarks have been reproduced, in abridged form, in 34 *Journal of Taxation* 168 (March 1971), under the title *IRS is considering far reaching changes in ruling on exempt organizations*. Citations throughout this brief are to the original remarks, which were publicly distributed. See also Rogovin, *Tax Exemptions: Current Thinking Within the Service*, N.Y.U. 22nd Ann. Inst. On Fed. Tax. 945, 952 (1964).

<sup>15</sup> As the Court of Appeals for the Fourth Circuit noted in *Bob Jones University v. Connally*, 472 F.2d 903, 906, *rehearing denied*, 476 F.2d 259 (1973), *petition for cert. pending* (No. 72-1470): "We have no doubt that Jones University will suffer irreparable injury if withdrawal of its tax-exempt status is effected even if it should ultimately prevail in its argument that its tax-exempt status may not legally be disturbed. . . . [W]e would be naive indeed not to recognize the substantial portion that contributions play in the gross income of any institution of higher learning and the adverse effect on those contributions if their deductibility for income and estate tax purposes of the donors is disallowed."

Thus, the court below was amply justified in focusing upon the practical importance to respondent of the decision by the Revenue Service to revoke its letter ruling. Such a ruling is functionally equivalent to a license to carry on operations, and its revocation bears very serious consequences.

**II. THERE ARE NO REAL ALTERNATIVES TO A SUIT FOR INJUNCTIVE RELIEF AS A MEANS TO REVIEW A RULING REVOCATION**

The Commissioner does not dispute respondent's vital interest in the ruling which the Revenue Service has revoked. But he contends there is no reason for the courts to consider an injunction to restore that ruling. In his view, respondent has alternative means to bring its case before a court: a suit by a "friendly donor" for a refund of income taxes (based on a claimed "charitable contribution" to respondent), or a suit by respondent itself for a refund of unemployment taxes.

These alternatives are not designed to present a court with the issues involved in a ruling revocation, and they are ill suited to that purpose. Neither the suit by a "friendly donor" nor the suit for refund of unemployment taxes permits review of the revocation itself, and neither provides a real opportunity for an aggrieved organization to regain its letter ruling and inclusion in the *Cumulative List*—its "license" to operate.

Even in theory, the issues presented in the supposed alternatives are not those which the organization wishes resolved. The suggested suit by a "friendly donor" does not permit the organization to assert *its* rights and interests. In the present case, for example, respondent advances a variety of First Amendment contentions based on its rights to freedom of speech and

to petition the Congress for a redress of grievances. It is not at all clear that a friendly donor would be in a position to raise similar arguments in support of a claimed charitable contribution to respondent.

On the other hand, the suit for a refund of unemployment taxes does not focus on the critical issue of eligibility under section 170(c)(2) to receive deductible charitable contributions.<sup>16</sup> Although it is possible that such a suit could succeed in establishing exempt status under section 501(c)(3), it is questionable whether a victory of this nature would be equivalent to a letter ruling in the eyes of prospective donors.

Moreover, both of the suggested alternatives entail, in practice, a real problem of delay. In the time required for a final adjudication of either type of suit, many organizations having lost their ruling would be gravely and perhaps permanently crippled. Commissioner Thrower made this point very clearly:

There is no practical possibility of quick judicial appeal at the present. . . . Assuming the readiness of the organization or donor to litigate, the issue under the best of circumstances could hardly come before a court until at least a year after the tax year in which the issue arises. Ordinarily, it would take much longer for the case of the organization's status to be tried. As for testing by the donor, even if all administrative appeals are waived, the organization must wait until it or its donor files a tax return, the Service processes the return, the return is selected and examined, and a deficiency is proposed. Probably, the case would be developed more quickly if the taxpayer re-

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<sup>16</sup> The same may be said of a suit for refund of social security taxes which, in the circumstances of this case, the Commissioner does not claim to be an adequate alternative remedy. (Brief for Petitioner, p. 19, n.12.)

frained from taking the deduction on his return but promptly filed a claim for refund. While all of this time is passing, the organization is dormant for lack of contributions and those otherwise interested in its program lose their interest and move on to other organizations blessed with the Internal Revenue imprimatur; and the right to judicial review is not pursued.<sup>17</sup>

Finally, most importantly, neither of the suits suggested by the Commissioner as alternative remedies can produce the practical consequences which attend upon a ruling from the Revenue Service. The Service's own views concerning decisions in such suits reveal their limited efficacy. Paragraph 270 of the *Exempt Organizations Handbook*, the Service's official internal manual in this area of the tax law, states:

An organization which obtains a tax court or district court decision holding it to be exempt must file an exemption application and establish its right to exemption before the Service will recognize its exemption for years subsequent to those involved in the court decision.<sup>18</sup>

This means that a favorable judicial decision does not of its own force lead to either the issuance of a ruling by the Service or to inclusion in the *Cumulative List*. As noted previously, these constitute the means of assurance on which many prospective donors rely in determining where their philanthropy will be directed.

Paragraph 270 of the Handbook focuses on the essential difference between a ruling from the Service

<sup>17</sup> Thrower Remarks, p. 3.

<sup>18</sup> Department of the Treasury, Internal Revenue Manual, Part XI, Chapter (11) 671, *Exempt Organizations Handbook* ¶ 270.

and a victory in court by either of the alternative routes which the Commissioner proposes: the ruling is a prospective statement, ensuring exemption and eligibility to receive deductible contributions as long as a certain general mode of operations is employed; the court decision is retrospective, focusing on specific facts that occurred during a particular period in the past and no others. In other words, the alternative judicial remedies suggested by the Commissioner are not truly alternative remedies. The essential relief sought by respondent—advance recognition of charitable status—cannot be granted by a court in the suggested proceedings, and the Service has not committed itself to provide such relief in the event of a court decision adjudicating exempt status.

**III. THE ANTI-INJUNCTION ACT NEED NOT AND SHOULD NOT BE INTERPRETED TO BAR THE INJUNCTIVE REMEDY IN THIS CASE**

For the reasons set forth above, if the alternatives suggested by the Commissioner were the only remedies available to an organization whose ruling was revoked, many such revocations would escape judicial review altogether. It is apparently the Commissioner's position that the anti-injunction act, section 7421(a) of the Code, read in light of *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), requires this result. He maintains that injunctive relief is unavailable here even if the alternatives are completely inadequate.<sup>19</sup> It does not matter that an important interest of the

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<sup>19</sup> The Commissioner's position is that *Williams Packing* will permit injunctive relief only upon a threshold showing of "an abuse of the executive power so blatant as to render it certain that revenue officials cannot prevail on the merits of their claims." (Brief for Petitioner, p. 8.) Respondent does not purport to have made such a showing.

respondent has been harmed; that the administrative action causing the harm may have been erroneous or even unconstitutional; that the respondent is without practical remedy. All of these considerations are overridden, in the Commissioner's view, by section 7421(a) and "the Executive's need to assess and collect taxes as quickly and as efficiently as possible, with a minimum of delay and interference from the judicial branch." (Brief for Petitioner, pp. 14-15.)

The Commissioner's position is both unsupported and dangerous. It is not required by the anti-injunction act or *Williams Packing*. It essentially seeks an extension of the act's coverage to an area where it does not in terms or purpose apply, and where it would threaten other congressional policies expressed in the Internal Revenue Code.

**A. This Case Does Not Involve a Restraint on the Assessment or the Collection of Taxes**

Section 7421(a) precludes suits "for the purpose of restraining the assessment or collection of any tax." Plainly, the statute cannot reach every action which could limit the Government's prospects of ultimate success in tax disputes. To construe section 7421(a) so broadly would bar any litigation of tax issues—in refund cases, Tax Court proceedings, or otherwise; for collateral estoppel, *stare decisis*, or simply respect for precedent will frequently extend such a limiting effect to decisions in actions of those kinds also. Section 7421(a) must be restricted to actions which seek to interfere with the procedural power of the Service "to assess and collect taxes alleged to be due . . ." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. at 7.

This is not such a suit. It is, rather, an action seeking to regain a ruling that has been revoked by the

Revenue Service, and thereby to restore respondent's practical ability to raise funds. Assessment and collection of the respondent's taxes remain legally available to the Service whether or not such a ruling is in effect,<sup>20</sup> and both could be sustained upon a showing that the respondent had not operated in accordance with the provisions of sections 501(c)(3) and 170(c)(2).<sup>21</sup>

It is true that if the Service assessed taxes against an organization in the face of a court-ordered ruling recognizing its status under sections 501(c)(3) and 170(c)(2), the agency might find it difficult to prevail on the merits in the absence of a showing that the law had changed since the court's decision or that the organization had ceased to act in accordance with the facts upon which the court's decision was founded. But this result would follow from the substance of the prior decision, not from the fact that the decision was obtained in an injunctive proceeding for review of a ruling revocation. Any type of judgment on the merits — including one rendered in a refund suit — has the

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<sup>20</sup> Both "assessment" and "collection" are statutory terms. The rules relating to "assessment" are set forth in subtitle F, Chapter 63 of the Internal Revenue Code, sections 6201 through 6216. "Collection," on the other hand, is described in subchapter F, Chapter 64, Code sections 6301 through 6344. Since the impact of a ruling is not statutorily described, the statute does not envision that a ruling will affect assessment or collection in any way.

<sup>21</sup> The Revenue Service retains the right to revoke rulings "at any time in the wise administration of the taxing statutes," and to apply revocations with retroactive effect "unless the Commissioner or his delegate exercises the discretionary authority under section 7805(b) of the Code to limit the retroactive effect of the revocation or modification." Rev. Proc. 72-3, 1972-1 C.B. 698, 705. The general statement of views on retroactivity appearing in section 13.05 of this Revenue Procedure is broad enough not to limit the Service's freedom.



same impact on the Government's chance of success in later controversies.<sup>22</sup> Hence, this cannot be the kind of restraint on assessment which section 7421(a) envisions.

Furthermore, relief of the type sought in the instant action would have at most only slight and tangential effects upon the revenue. With respect to the organization itself, the Service would not be precluded from collecting any valid taxes. In most circumstances, it would not even be prevented from collecting invalid taxes pending a refund action.<sup>23</sup>

So far as donors to the organization are concerned, to the extent the relief requested would include res-

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<sup>22</sup> The courts that have been faced with the question whether injunctive relief against a ruling revocation or denial constitutes a restraint on assessment or collection have not subjected the issue to analysis, but have simply assumed that any decision contrary to the will of the Commissioner was within the reach of section 7421(a). See, e.g., *Crenshaw County Private School Foundation v. Connally*, 474 F.2d 1185 (C.A. 5, 1973), *Bob Jones University v. Connally*, 472 F.2d 903, rehearing denied, 476 F.2d 259 (C.A. 4, 1973), petition for cert. pending (No. 72-1470); cf. *Jolles Foundation v. Moysey*, 250 F.2d 166 (C.A. 2, 1957). But see *McGlotten v. Connally*, 338 F. Supp. 448 (D. D. C. 1972).

<sup>23</sup> It may be that a taxpayer faced with an attempted assessment in the face of a court-ordered ruling might bring suit then to restrain it. If the taxpayer could establish that the assessment had no firmer basis than disagreement with the court's conclusions, it might succeed in establishing what the Commissioner has termed a "blatant abuse of executive power," which would justify injunctive relief against the assessment even on the Commissioner's view in this case.

Presumably, exhaustion of administrative remedies would be required before even this type of relief could be given. And, contrary to suggestions by the Commissioner (Brief for Petitioner, pp. 10, 25-26), preliminary relief would doubtless be no more readily available than it is in any other kind of case. See, e.g., *Virginia Petroleum Jobbers Ass'n v. F.P.C.*, 259 F.2d 921 (C.A. D.C. 1958).

toration of the organization's name to the *Cumulative List*, the relief might bar an effort to assess tax even if the governing law or pertinent facts had significantly changed.<sup>24</sup> That consequence, however, flows, not from the order here sought from the court, but from the "advance assurance of deductibility" which the Revenue Service has itself chosen to grant in connection with its administration of the charitable provisions of the Code. See Revenue Procedure 72-39, 1972-1 C.B. 818. Respondent simply asks that, if it is found legally entitled to charitable qualification under section 501(c)(3), it enjoy the benefits which the Service affords to other groups which have established that status.

Moreover, it is purely conjectural whether appearance on the *Cumulative List* would, in fact, affect the revenue in the slightest. If respondent is not permitted to enter into this favored group, those prospective donors who rely on such listing may well contribute to other organizations appearing on the *List*. Confronted by the penalty taxes of section 4945, most private foundations will surely withhold their grants, or make them to others — leaving the revenue, again, unaffected. In this respect also, the situation now before the Court differs essentially from the mainstream of litigation under section 7421(a), where injunctive actions carry plain, direct, and immediate consequence for the revenue.

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<sup>24</sup> To the extent that relief is limited to restoration of the ruling only, no such bar would apply. See Rev. Proc. 72-39, 1972-1 C.B. 698.

**B. The Policy Behind Section 7421(a) Does Not Require Its Application Here**

This Court has viewed section 7421(a) as an integral part of "a system of corrective justice, intended to be complete" which includes "stringent measures, not judicial, to collect [taxes] . . . , with appeals to specified tribunals and suits to recover back moneys illegally exacted . . . ." *Snyder v. Marks*, 109 U.S. 189, 193-94 (1883). It has noted that "there is no place in this system for an application to a court of justice until after the money is paid." *State Railroad Tax Cases*, 92 U.S. 575, 613 (1876). But the refund system, though well suited to typical tax controversies in which financial issues and past events predominate, is by its very structure an inadequate vehicle for providing relief from a wrongful decision on charitable qualification. As *amici* have argued, the mechanism is not aimed in theory at the resolution of the issues raised by such a wrongful decision nor is it adaptable in practice to remedy its consequences for the aggrieved organization.

There is no reason to believe that section 7421(a) was intended to preclude adequate relief in the circumstances presented here. At the time of its initial enactment, in 1867, Congress surely did not foresee that by the latter half of the twentieth century important interests would turn on a letter ruling program whereby the Revenue Service tentatively recognized, prior to assessment, an organization's eligibility to receive deductible contributions. Nor is there any indication in the subsequent re-enactments of section 7421(a), or in the various ways in which congressional notice has been taken of the letter ruling program, that Congress has ever considered the ade-

quacy of the refund remedy for a charitable organization injured by erroneous revocation of its letter ruling. The fact is that rulings on charitable status are not an integral part of the "system of corrective justice" of which this Court has spoken, and it cannot be assumed that Congress intended to remit parties suffering wrongful revocation of such rulings to a refund remedy that is so crudely fitted to their needs.

### C. Williams Packing Does Not Apply Here

Finally, the Court's decision in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), upon which the Commissioner places near-exclusive reliance for his reading of section 7421(a), is by no means controlling here. *Williams Packing* was a prototypical example of the sort of premature judicial intervention in the normal tax collection process which section 7421(a) was designed to prevent. After the Government had made a formal demand for \$41,568.57 in social security and unemployment taxes, the taxpayer there brought suit seeking an injunction against the collection of this sum. *Williams Packing & Navigation Co. v. Enoch*s, 176 F. Supp. 168, 173 (S.D. Miss., 1959). It alleged that the assessment was illegal under the governing statutes, that collection of the taxes would destroy its business, and that the normal remedy of a refund suit was therefore inadequate. The Government disputed these allegations and claimed that the refund remedy was available and adequate. The lower courts found for the taxpayer.

This Court held that inadequacy of legal remedy alone was not a sufficient basis for the issuance of an injunction restraining the collection of taxes. Section 7421(a) reflects a strong congressional policy of pre-

venting courts from interfering with tax collection in cases where Congress has provided a generally adequate remedy in the form of a refund suit. "Thus, in general, the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid." 370 U.S. at 8. Whether the refund remedy is in fact adequate in a particular case presents, as *Williams Packing* itself demonstrated, a difficult factual question. If that were the sole question to be resolved before an injunction against collection could issue, the congressional purpose behind the "complete system of corrective justice" would not be respected.

The *Williams Packing* approach is perfectly suited to the *Williams Packing* facts—involving a taxpayer's effort, after the administrative collection process had already been set in train, to restrain the collection of taxes, and where lower courts had upheld the taxpayer's position on the dubious view that the refund remedy was inadequate in his particular case. The *Williams Packing* analysis does not, however, fit the present case. This controversy does not involve assessment or collection of taxes, so the clear words of the statute, so important a factor in *Williams Packing*, do not require its application here. Moreover, the inadequacy of the refund remedy for this type of action is a structural and general inadequacy, not merely one based on the difficulties encountered by a particular taxpayer in the payment of tax necessary to initiate a refund suit. Thus, the question here is whether the bar on injunctions is to be extended from the *Williams Packing* facts, where it is clearly required by the statutory words and policy and where it affords a workable accommodation of Government and taxpayer interests,

to the present situation, where none of those considerations apply and where its employment would contravene clear congressional policies and endanger rights protected by the First Amendment.

**D. A Bar on Adequate Judicial Review of Revocations of Exemption Rulings Would Undermine the Provisions of the Internal Revenue Code Relating to Charities**

*Williams Packing* states a sometimes harsh rule—that even a showing of the inadequacy of other remedies may not open the door to a judicial determination of the legality of executive action. That rule is probably necessary in the context of the normal tax audit, assessment, and collection process, and in any event has been clearly established by Congress to protect the Government's interest in orderly tax administration. Its invocation is, however, questionable in circumstances outside that context and where to apply it would contravene other strong policy considerations.

As discussed above, the Service's ruling program is tantamount to a licensing procedure for charities, under which the opportunity to function as an exempt organization pursuant to sections 501(c)(3) and 170(c)(2) is effectively determined by whether an organization has a ruling. Because of the inadequacies of alternative remedies, a holding that injunctive relief is unavailable would mean that the Service's ruling decisions relating to qualification as a charity would often escape review altogether.

This result—giving the Service virtually plenary power over the existence of charities—is squarely contrary to the intentions of Congress as expressed in sections 501(c)(3) and 170(c)(2). In providing special tax benefits to specified philanthropic organizations

and those who contribute to them, Congress was not endeavoring to raise revenues but to advance certain goals which it considered particularly worthy.<sup>25</sup> Congress concluded that the service of public purposes through private charitable action deserves support through the tax laws.<sup>26</sup>

The legislative policy was thus to encourage a pluralistic nongovernmental performance of public functions.

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<sup>25</sup> Commissioner of Internal Revenue Donald C. Alexander recently expressed the same thought in published remarks at a meeting of the American Society of Association Executives in New Orleans, Louisiana, August 29, 1973:

The IRS recognizes that the exempt organization provisions of the law must be interpreted and administered in light of their special purpose and their place in the tax law. Their purpose is *not* to raise revenue. Rather, they are designed to act as a guardian. They insure that exempt organization assets will be put to the approved uses contemplated in the law. Their application calls for an extraordinary degree of care and judgment.

BNA Daily Tax Report, August 30, 1973, p. J-1. [Emphasis in original.]

<sup>26</sup> These considerations are amply reflected in, for example, the 1965 Treasury Department Report on Private Foundations:

Private philanthropic organizations can possess important characteristics which modern government necessarily lacks. They may be many-centered, free of administrative superstructure, subject to the readily exercised control of individuals with widely diversified views and interests. Such characteristics give these organizations great opportunity to initiate thought and action, to experiment with new and untried ventures, to dissent from prevailing attitudes, and to act quickly and flexibly. Precisely because they can be initiated and controlled by a single person or a small group, they may evoke great intensity of interest and dedication of energy. These values, in themselves, justify the tax exemptions and deductions which the law provides for philanthropic activity.

Report submitted to the Committee on Finance, United States Senate, 89th Cong., 1st Sess. 12 (Comm. Print).

Congress certainly did not intend to undermine its own policy by giving an executive agency, the Internal Revenue Service, unreviewable and therefore "un-abusable" discretionary power to decide what charitable organizations may and may not do. The position of Congress was in fact clearly stated recently, in the Committee reports dealing with the Tax Reform Act of 1969. Explaining the newly added section 508(a), which requires organizations claiming section 501(c) (3) exemption to notify the Service that they are applying for recognition of such status, both Houses stated that "as under present law, the nature of the organization itself—not the determination of the Service—will control in determining whether the organization is exempt."<sup>27</sup> But without direct judicial review of the Service's rulings, as distinguished from the possibility of indirect judicial review in refund actions, the Service will in many cases be the final arbiter of which organizations are exempt charities and which are not.<sup>28</sup>

Such unfettered Service control over the scope of private charitable action would be more than merely anomalous. It would ill serve the congressional design. The issues raised by sections 501(c) (3) and 170(c) (2)—for example, what is a "charitable" or "educational" purpose—do not fall within the domain of the Revenue Service's particular expertise in the administration of the revenue laws. These issues involve concepts rooted in the common law, and are peculiarly

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<sup>27</sup> H. Rep. No. 91-413 (Part I), 91st Cong., 1st Sess. 38 (1969); S. Rep. No. 91-552, 91st Cong., 1st Sess. 54 (1969).

<sup>28</sup> As Commissioner Thrower stated, the situation "in practical effect . . . gives a greater finality to IRS decisions than we would want or Congress intended." Thrower Remarks, p. 4.



well-suited for court determination. Compare, *e.g.*, *Barlow v. Collins*, 397 U.S. 159, 166 (1970), relying upon *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 14 (1968) (Harlan, J., dissenting). Indeed, the Service's regulations recognize this very point, defining the statutory word "charitable" in terms of its "generally accepted legal sense" and "the broad outlines of 'charity' as developed by judicial decisions."<sup>29</sup> If injunctive relief does not lie in cases such as the present one, judicial decisions in this area will be rare.

As Commissioner Thrower observed, the situation "inhibits the growth of a body of case law interpretative of the exempt organization provisions that could guide the Internal Revenue Service in its further deliberations."<sup>30</sup> The problem is only enhanced by the fact that "we live in times of innovative thought. What people conceive of today as beneficial to the community in the charitable sense may involve concepts and approaches not remotely approached by the courts in past years."<sup>31</sup> Without judicial review of the Service's ruling determinations under sections 501(c)(3) and 170(c)(2), the Internal Revenue Service would be "the arbiter of innovation in the charitable field."<sup>32</sup> This would thwart the underlying purposes of those special tax provisions.

Absolute and unreviewable administrative discretion is the rare exception in our system of law. This Court

<sup>29</sup> Treas. Reg. § 1.501(c)(3)-1(d)(2). "Charitable" is recognized by the Service as the broadest of the statutory terms, embracing more specific terms such as "educational," "religious," and "scientific." Thrower Remarks, pp. 2, 6.

<sup>30</sup> Thrower Remarks, p. 4.

<sup>31</sup> Thrower Remarks, pp. 2-3.

<sup>32</sup> Thrower Remarks, p. 4.

has not generally favored the preclusion of judicial review of administrative actions having important consequences, and in fact its decisions point sharply in the opposite direction. There is a "presumption that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose." *Tooahnippah (Goombi) v. Hickel*, 397 U.S. 598, 606 (1970); *City of Chicago v. United States*, 396 U.S. 162, 164 (1969); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). No such "persuasive reason" can be found in the words or policy of section 7421(a). And in the policies and purposes of the charitable organization provisions, there is ample justification for applying the presumption in favor of judicial review.<sup>33</sup>

The Commissioner contends that such review would place an inordinate burden on the Government. To the extent that the alternative remedies which he proposes are, as he contends, adequate to protect respondent's interests, the Government would have exactly the same burden, though at a different point in time, that the relief requested here would entail. The Commissioner is correct in asserting added burden only on the premise — correct in fact — that the alternatives he suggests would frequently result in no judicial review at all. The answer, then, to the Commissioner's argument based on burden is that the need to conserve Government manpower cannot be allowed to preclude ade-

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<sup>33</sup> Compare *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970): "The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized."

quate judicial review for persons aggrieved by adverse agency action.<sup>34</sup>

In sum, *amici* urge rejection of the Commissioner's argument against review on the basis of section 7421(a).<sup>35</sup> *Amici* ask the Court to hold that, upon a showing of an unlawful revocation of respondent's ruling, the injunctive remedy is available in this case.

**IV. SECTION 7421(a) SHOULD BE HELD NOT TO APPLY IN THIS CASE BECAUSE ITS APPLICATION HERE WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS**

*Amici* have thus far argued for affirmance of the Court of Appeals' decision wholly without reference to the important First Amendment interests which are at stake in this case. However, these interests present a number of further reasons why the Court below was correct in upholding meaningful judicial review of the

<sup>34</sup> Moreover, in the seven years prior to May 1972, the Service had revoked only seven section 501(c)(3) exemptions for prohibited legislative activity. Letter from Edwin S. Cohen, Assistant Secretary of the Treasury for Tax Policy, to Chairman Wilbur D. Mills, May 25, 1972, in *Hearings on H.R. 13720 Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. at 15 (1972). This suggests that availability of prompt judicial review in disputes of the precise type involved here would not impose an inordinate burden on the Government's litigation resources or on the courts.

<sup>35</sup> The Commissioner's other arguments are clearly without merit. His own quotations from the legislative history of the Declaratory Judgment Act (Brief for Petitioner, pp. 37-42) establish that that statute's restriction on relief in tax cases must be considered coterminous with the restriction in section 7421(a). His position on sovereign immunity (Brief for Petitioner, pp. 42-49) would effectively preclude most suits to prevent the enforcement of unconstitutional statutes. And, contrary to his contentions (Brief for Petitioner, pp. 49-56), the First and Fifth Amendment issues raised by sections 501(c)(3) and 170(c)(2) clearly warrant the convening of a three-judge court.

revocation of respondent's ruling. Prior decisions of this Court raise serious constitutional doubts about an interpretation of section 7421(a) that would effectively accord the Revenue Service an unreviewable life-or-death power to restrain charities' activities. And it would seem appropriate, under settled canons of statutory construction, to interpret the statute in a fashion that will avoid such doubts. See, *e.g.*, *United States v. Rumely*, 345 U.S. 41, 45-46 (1953); *Kent v. Dulles*, 357 U.S. 116, 128-29 (1958); *Gutknecht v. United States*, 396 U.S. 295, 306 (1970). Therefore, even if section 7421(a) is thought generally to preclude injunctive relief when a ruling on charitable status is revoked, such relief should nonetheless be held available in this case, where a substantial claim is made of unconstitutional restrictions on First Amendment activities.

The Commissioner belittles the emphasis which the Court of Appeals placed on the constitutional nature of respondent's claims. He notes that section 7421(a) has been held to apply irrespective of allegations of unconstitutionality. And he asserts that the approach taken by the court below invites circumvention of the policies behind the section, since many ordinary tax suits could be framed in constitutional terms. (Brief for Petitioner, pp. 22-23.) But none of the constitutional cases cited by the Commissioner involved the threat to freedom of expression that is involved here. And it is not an easy matter to convert the ordinary tax suit into a nonfrivolous claim of restraint on First Amendment freedoms.

The tax laws relating to charities are unique in their impact on First Amendment activity. In practice, ex-

ercise of the right of association to advance common interests frequently depends on qualification of the association for section 501(c)(3) exemption. Moreover, speech and speech-related activities are a primary means—and often the only means—whereby the “religious,” “charitable,” and “educational” purposes specified in the statute can be advanced.<sup>36</sup> The Revenue Service, whose task it is in the first instance to interpret and apply the statutory classifications, is continually charged with the delicate task of determining whether particular forms of First Amendment activities qualify for the statutory benefits. To the extent that the Service errs in such judgments—and the interpretation of terms such “charitable” and “educational” require exceedingly fine legal and factual judgments—the error may be constitutionally, as well as statutorily, impermissible.<sup>37</sup>

Furthermore, the very terms of the statutory provisions touch upon First Amendment rights. Sections

<sup>36</sup> The pertinent Treasury Regulations reflect these facts by acknowledging that organizations exempt as “charitable” or “educational” may engage in advocacy of positions on controversial issues. See, e.g., Treas. Reg. §§ 1.501(c)(3)-1(d)(2), -1(d)(3).

<sup>37</sup> Of course, not all of these judgments necessarily give rise to First Amendment questions. Some criteria under the statute—for example, absence of inurement of benefits to private individuals—may require disqualification for reasons having nothing to do with an organization’s First Amendment activities. But the concern expressed in text is very real. *Amici* are aware, for example, of the denial of a ruling to one organization seeking recognition as “educational” because, in the Service’s view, the organization did not employ “an educational methodology communicating a useful body of organized knowledge.” Whether or not the statute authorizes a judgment of this nature, the agency is plainly operating in an area of subtle constitutional judgments.

501(c)(3) and 170(c)(2) explicitly condition the benefits they provide on the foregoing of substantial activities involving "attempting . . . to influence legislation." Restrictions on such activities clearly must meet First Amendment standards. In the present case the Service has relied upon the statutory restrictions in determining that respondent engages in excessive expression and therefore does not qualify for the statutory benefits. Respondent seeks—and the Court of Appeals granted—an opportunity for a judicial determination of its claim that those statutory restrictions are unconstitutional, both on their face and as applied by the Revenue Service.

The fact that sections 501(c)(3) and 170(c)(2) do not purport to regulate First Amendment activities directly, but merely to grant or withhold important tax benefits on the basis of such activities, does not detract from the force of respondent's constitutional contentions. It is settled that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513 (1958).<sup>38</sup>

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<sup>38</sup> This Court's decision in *Cammarano v. United States*, 358 U.S. 498 (1959), by no means disposes of the First Amendment issues presented here. *Cammarano* upheld a regulation denying taxable corporations a business expense deduction under section 162 for the costs of efforts to influence legislation. Section 162(e), enacted by Congress in 1962, specifically makes most costs of business lobbying activities deductible, thereby eliminating the "sharply defined policy" against tax-free legislative activities on which this Court relied in *Cammarano*. This change also introduces an imbalance between businesses and charities with respect to the effect of legisla-

The need for access to the courts to protect First Amendment rights is the greater here because a prior restraint is at issue. Even without the Service's letter ruling program, sections 501(c)(3) and 170(c)(2) would arguably give rise to First Amendment controversies requiring judicial review. But the ruling program, whereby the Service effectively licenses organizations to raise funds and pursue the statutorily favored purposes, makes the validity of unreviewable Service discretion even more dubious. Operating through this program the agency is not functioning as an adjudicator of past facts, but rather is screening for the future: as a censor. As *amici* have discussed, the denial or revocation of a ruling generally means, as a practical matter, that an organization's activities — many of which will be First Amendment activities — will at least be sharply curtailed and often that the organization will go out of existence. Thus the ruling program permits the Service effectively to choose either to permit or to prevent the exercise of First Amendment rights by the very large class of organizations which must rely on contributions from the public.

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tive activities on tax benefits. See Statement of Edwin S. Cohen, Assistant Secretary of the Treasury for Tax Policy, in *Hearings on H.R. 13720 Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. at 607 (1972). Such an imbalance raises important equal protection claims not present when *Cammarano* was decided. See, e.g., *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

Moreover, the restrictions of sections 501(c)(3) and 170(c)(2), which in practice condition an exempt charitable organization's entire existence on refraining from substantial legislative activity, present a very different issue from the limited question of whether a business may or may not deduct certain of its expenses. See 358 U.S. at 515 (Douglas, J., concurring).

The Service's administrative program of screening organizations for compliance with the broad statutory provisions, and of issuing letter rulings reflecting its conclusions, carries all the hallmarks of a system of prior restraints. Ruling denials or revocations can exert a far greater practical burden and a far more severe restraint on First Amendment activities than this Court found in the activities of a university administration in *Healy v. James*, 408 U.S. 169, 181, 184 (1972). And the Commissioner's claim of an essentially unreviewable power to prevent First Amendment activities through the issuance of ruling denials or revocations appears untenable in light of other decisions of this Court.

It has been held that "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The Court has repeatedly indicated that, to be sustained at all, such a system must include carefully drawn procedural safeguards against abuse. See, e.g., *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363 (1971); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrants of Property*, 367 U.S. 717 (1961). The general principle often echoed in the decisions is that "the freedoms of expression must be ringed with adequate bulwarks." *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 66, citing *Marcus v. Search Warrants of Property*, *supra*; *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Winters v. New York*, 333 U.S. 507 (1948);



*NAACP v. Button*, 371 U.S. 415 (1963); and *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

In particular, a system of prior restraints must include provision for expeditious judicial review. *Blount v. Rizzi*, *supra*; *Freedman v. Maryland*, *supra*; *Teitel Film Corp. v. Cusak*, 390 U.S. 139 (1968); *Bantam Books, Inc. v. Sullivan*, *supra*; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 155 n.4 (1969). The administration of the system cannot be "in a manner which would lend an effect of finality to the censor's determination . . ." *Freedman v. Maryland*, 380 U.S. at 58. Because "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Ibid*.

While the Court has most fully developed the implications of these principles in the area of obscenity, they apply with at least equal force in other areas where First Amendment interests are importantly in question.<sup>89</sup> In this case, for example, the loss of respondent's ruling has drastically limited all of its prior activities, including legislative activities. There is an even greater need for judicial supervision of restraints of this nature than in the case of expression that is arguably obscene. Compare *Shuttlesworth v. Birmingham*, 394 U.S. at 162-63 (Harlan, J., concurring).

The Commissioner maintains that the restraints imposed on charitable organizations through his letter ruling program cannot be reviewed directly, by actions

<sup>89</sup> See generally Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 520-26 (1970).

seeking injunctive relief. But the alternative remedies which he proposes involve considerable delay and are inadequate for other reasons as well. These alternative remedies are "too little and too late" to provide effective review of prior restraints on expression imposed by the Revenue Service. *Freedman v. Maryland*, 380 U.S. at 57; see *Teitel Film Corp. v. Cusak*, 390 U.S. at 141-42; *Blount v. Rizzi*, 400 U.S. at 418-19. If the Commissioner's position were to be sustained in this case, the import of *Freedman* would be sharply circumscribed. For the Commissioner is essentially claiming that a policy favoring rapid collection of taxes should override the First Amendment, "an interest of transcending value." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

It is not necessary in this case for the Court to decide the constitutionality of a statute which effectively bars adequate review of prior restraints on expression. Section 7421(a) need not be so interpreted. The statute can be construed not to apply in cases raising substantial First Amendment claims. If the Court rejects the position stated in the prior portion of this brief—that injunctive relief is always available for denial of a ruling on charitable qualification—*Amici* urge the Court to affirm the decision of the Court of Appeals on this constitutional basis.

**CONCLUSION**

For the foregoing reasons, *amici* believe that the decision of the court below is correct and should be affirmed by this Court.

Respectfully submitted,

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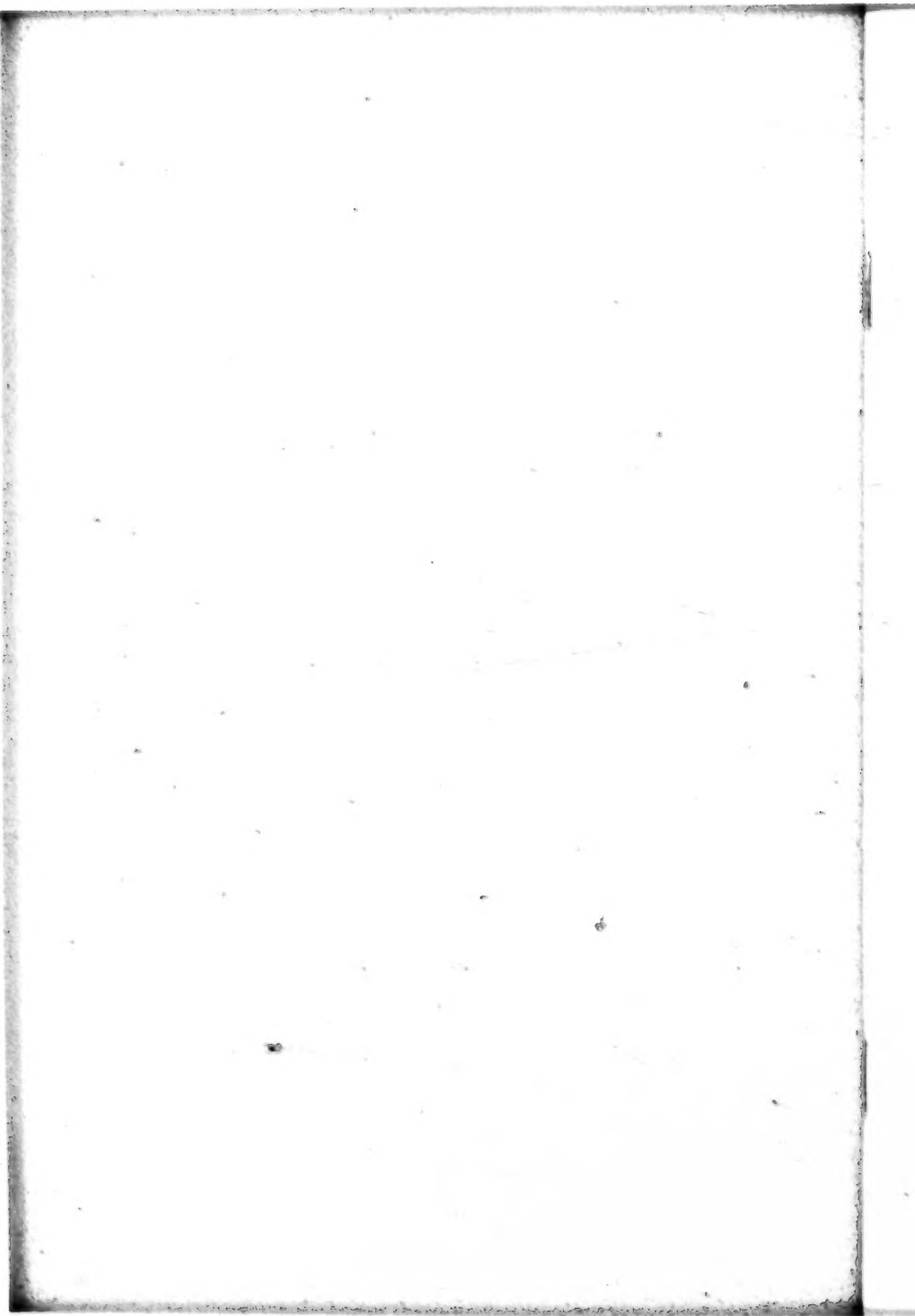
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September 26, 1973



MOTION FILED

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IN THE  
***SUPREME COURT OF THE UNITED STATES***

OCTOBER TERM, 1973

NO. 72-1371

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DONALD C. ALEXANDER, COMMISSIONER  
OF INTERNAL REVENUE,

*Petitioner,*

v.

"AMERICANS UNITED" INC., ETC. ET AL.,

*Respondents.*

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On Writ Of Certiorari To The United States Court  
Of Appeals For The District Of Columbia Circuit

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MOTION FOR LEAVE TO FILE A BRIEF OUT OF TIME  
AND BRIEF OF THE NATIONAL JEWISH COMMISSION ON  
LAW AND PUBLIC AFFAIRS AS  
*AMICUS CURIAE*

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On Writ Of Certiorari To The United States Court  
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MOTION FOR LEAVE TO FILE BRIEF FOR THE  
NATIONAL JEWISH COMMISSION ON  
LAW AND PUBLIC AFFAIRS

The National Jewish Commission on Law and Public Affairs hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief *amicus curiae* out-of-time. As is indicated by letters on file with the Clerk, the movant has obtained the consent of the parties to this case for the filing of such a brief.

Under Rule 42(2) of this Court, a brief *amicus* must be filed at or prior to the date upon which the brief of the party it supports is to be filed. In this case, the brief submitted herewith should have been filed on or before September 26, 1973, when respondent's brief was due for filing.

Due to a lack of communication and coordination during the summer, counsel for *amicus*, all of whom serve without compensation, only learned recently that the petitioner had filed its brief, and that respondent's brief would be due on September 26, 1973. We have prepared the attached brief as quickly as possible, consistent with the high standards of quality expected of a brief filed in the Supreme Court. We have also submitted a draft of this brief to the petitioner prior to the time his reply brief was due to enable him to reply to this brief as well as the respondent's.

For the foregoing reasons the National Jewish Commission on Law and Public Affairs respectfully requests that leave be granted to file the attached brief *amicus curiae* out-of-time.

Respectfully submitted,

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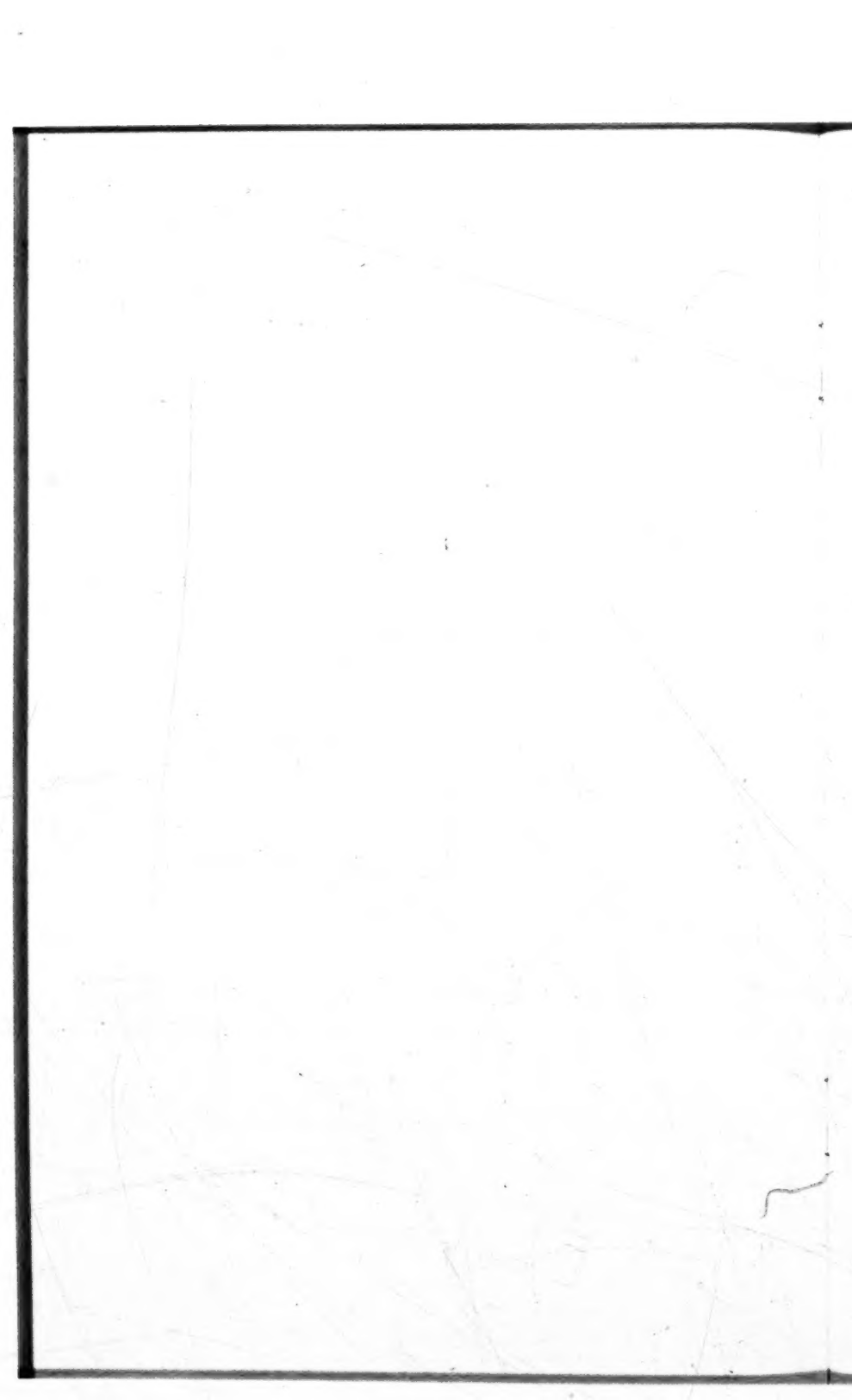
Brief Of National Jewish Commission On  
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**Brief Of National Jewish Commission On  
LAW AND PUBLIC AFFAIRS AS *AMICUS CURIAE***

This brief is submitted on behalf of the National Jewish  
Commission on Law and Public Affairs and is joined in by the  
following organizations:

Agudath Harabonim,  
Union of Orthodox Rabbis  
Agudath Israel of America  
National Council of Young Israel  
Poalei Agudath Israel of America  
Rabbinical Alliance of America  
Rabbinical Council of America  
Religious Zionists of America  
Torah Umesorah, National Society  
of Hebrew Day Schools  
Union of Orthodox Jewish  
Congregations of America

## INTEREST OF THE *AMICUS CURIAE*

The National Jewish Commission on Law and Public Affairs is a voluntary organization organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern.

The Commission is deeply committed to the preservation of the Constitutional rights of all Americans, and in particular to the principles of the First Amendment, in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the highest form of liberty. The Commission firmly believes that the Free Exercise clause of the First Amendment was designed by the nation's Founding Fathers to prevent the Government from meddling or otherwise interfering with the rights of individuals with respect to religious practices and other matters of conscience. This, in turn, requires that religious institutions be treated fairly and equally at the hands of the Government.

This case presents a crisis of sorts, because the Government asserts, through the medium of one of its agencies — the Internal Revenue Service — the right to determine the permissible limits of protected First Amendment activities. Any attempt to transcend the Government's own unilateral limitations results in financial strangulation through the withdrawal of the organization's tax exemption under § 501(c)(3) of the Internal Revenue Code. Moreover, the Government then asserts that its *ex parte* determination may not be reviewed in any court or, perhaps, may not be reviewed until after a delay of such magnitude that any review becomes meaningless. Judicial sanction of this position would rend the fabric of all Constitutional freedoms.



Although petitioner suggests in his brief (p. 35, n.25) that citizens should not presume that Treasury officials will act in bad faith, political realism makes us much less sanguine about official motivations. We have seen a President prepare his "lists of enemies" and instruct administration officials to "harass" his political opponents. Such actions were taken with the knowledge and consent of top officials. At lower levels of the bureaucracy, it is even more likely that particular administrative employees will attempt to inflect their personal political views into the interpretation of the law without regard to whether such views are correct or consistent with the Constitution.

In a sound Constitutional setting, citizens should not be subject to the arbitrary decisions of individual Government officials without recourse to the judiciary. Indeed, our entire Constitutional system of checks and balances is designed to prevent such a situation. The system least tolerates unchecked power which may chill or otherwise impair the exercise by a citizen of basic Constitutional rights.

In the instant case, it is conceivable that the decision of a single Government official could effectively destroy the ability of a group of citizens to exercise basic First Amendment rights. Unless this Court holds that the aggrieved parties in such situations have immediate access to the courts, the freedom of each and every American will be sorely diminished.

## ARGUMENT

### THE STATUTORY BARS AGAINST INJUNCTIONS AND DECLARATORY JUDGMENTS IN FEDERAL TAX MATTERS DO NOT APPLY IN THIS CASE.

#### A. There Is No Bar To Injunctive Relief If The Primary Purpose Of A Suit Is Not To Restrain The Assessment Or Collection Of A Tax

Petitioner contends that respondent's suit cannot be maintained under the terms of the Tax Injunction Act, 26 U.S.C. § 7421(a), which prohibits suits "for the purpose of restraining the assessment or collection of any tax," and The Declaratory Judgment Act, 28 U.S.C. § 2201, which prohibits declaratory judgments "with respect to Federal taxes."

However, petitioner misconceives the thrust of those statutes. As the court of appeals below noted, the *raison d'être* of § 7421(a) was to prevent intermeddling in the tax collection process. Both the plain language of § 7421(a) as well as previous decisions of both this Court and others establish that the bar of § 7421(a) does not apply to a suit against the Internal Revenue Service where, as here, the purpose of the suit is not to restrain the assessment or collection of a tax. *Allen v. Regents*, 304 U.S. 439 (1938); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972). Furthermore, although the tax exception of 28 U.S.C. § 2201 would appear to be literally broader than the § 7421(a) prohibition, it has been held to be coterminous therewith. *McGlotten v. Connally*, *supra*. Consequently, neither 26 U.S.C. § 7421(a) nor 28 U.S.C. § 2201 are applicable here, and petitioner has cited no authority for their applicability in a case such as this.

Moreover, it is inconsistent to permit a third party to bring an injunction action—free of the bar of 26 U.S.C. § 7421(a) and 28 U.S.C. § 2201—to challenge the § 501(c)(3) status of an organization, *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970), on final injunction *sub nom. Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd per curiam sub nom. Coit v. Green*, 404 U.S. 997 (1971), while the organization itself is barred from bringing an identical action to preserve its § 501(c)(3) status. Due process of law and equal protection require uniform access to the courts.

**B. There Is No Bar To Relief If There Are  
Special And Extraordinary Circumstances**

This Court has long recognized that, even in the case of suits brought to prevent the assessment and collection of taxes, the bar against injunctive relief is not absolute, and an injunction suit may be maintained if "special and extraordinary circumstances" are present.

Thus, in *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932), this Court enjoined the collection of a tax because of the "special and extraordinary circumstances" therein. And although it held that "special and extraordinary circumstances" did not exist in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), this Court nevertheless confirmed therein that injunctive or declaratory relief could be granted where such circumstances are present. See also, *Dodge v. Osborne*, 240 U.S. 118 (1916); *Hill v. Wallace*, 259 U.S. 44 (1922). Thus, even assuming that 26 U.S.C. § 7421(a) and 28 U.S.C. § 2201 would otherwise apply, this suit may nevertheless be maintained because of the special and extraordinary circumstances present herein.

### C. Special And Extraordinary Circumstances Exist In This Case

#### (1) Lack Of Recourse To Any Other Tribunal Is A Special And Extraordinary Circumstance.

Numerous cases have held that an action for injunctive relief is not barred where the plaintiff otherwise lacked effective access to a judicial tribunal.

Thus, in *Clark v. Campbell*, 341 F. Supp. 171 (N.D. Tex. 1972), *Schreck v. U.S.*, 301 F. Supp. 1265 (D. Md. 1969), *Lisner v. McCanless*, 356 F. Supp. 378 (D. Ariz. 1973), *appeal to Ninth Circuit pending*, and *Rambo v. U.S.*, 353 F. Supp. 1021 (N.D. Ky. 1972), *appeal to Sixth Circuit pending*, it was held that a suit for an injunction is not barred where the Internal Revenue Service has made a jeopardy assessment and failed to follow up with the sixty-day notice of deficiency specified in 26 U.S.C. § 6861(b), where the failure to send the statutory notice prevented the taxpayer from bringing suit in the Tax Court. Even though it was theoretically possible to pay the jeopardy assessment and sue for a refund, the courts noted that a refund suit was an inadequate remedy for the taxpayers because after a jeopardy assessment (and collection) there would probably not be enough assets left in the hands of the taxpayer with which to pay the tax, and payment of the entire assessment is a jurisdictional prerequisite.\* *Flora v. U.S.*, 362 U.S. 145 (1960).

For similar reasons, it is well established that the Federal district courts may determine and enjoin collection of tax liabilities in bankruptcy and receivership proceedings. See, e.g.,

\* *Cf. Irving v. Gray*, \_\_\_\_ F.2d \_\_\_\_ (2d Cir. 1973) (73-2 U.S.T.C. ¶ 9581), in which the Court reached a contrary result, based in part on the conclusion that the taxpayer in this situation could sue for a refund notwithstanding an inability to satisfy the *Flora* requirements.

*U.S. v. Mighell*, 273 F.2d 682 (10th Cir. 1960); *National Foundry Co. of N.Y. v. Director*, 229 F. 2d 149 (2d Cir. 1956); *Jamy Corp. v. Riddell*, 337 F.2d 11 (9th Cir. 1964), *cert. denied* 380 U.S. 953; *In re Vaughan, Jr.*, 69-1 U.S.T.C. ¶ 9118 (E.D. Ky. 1968).

Still another line of cases held that the statutes in question did not bar a suit by a person whose own taxes were not in controversy. See, e.g., *Bullock v. Latham*, 306 F.2d 45 (2d Cir. 1962); *Long v. Rasmussen*, 281 F. 236 (D. Mont. 1922); *Filipowicz v. Rothensies*, 31 F. Supp. 716 (E.D. Pa. 1940); *Cf. Farmers Loan & Trust Co. v. Pollack*, 157 U.S. 429 (1895); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1 (1916); *Schweinler v. Manning*, 88 F. Supp. 964 (D.N.J. 1950).<sup>\*</sup> Subsequently, the principle of these cases was codified in 26 U.S.C. § 7426. Yet even after the enactment of § 7426, the underlying principle of that line of cases has retained its independent vitality, and has been applied to allow injunctive relief to a third party challenging the tax exemption of an organization. *McGlotten v. Connally*, *supra*; *Green v. Kennedy*, *supra*.

In each of these cases, the courts noted that, other than by an injunctive action, the complainant lacked effective access to any judicial tribunal. The absence of any other reasonable opportunity to timely try the issues was considered a critical factor in sustaining jurisdiction.

The Senate Committee Report on the tax exception to 28 U.S.C. § 2201 makes it quite clear that Congress assumed that the statutory bar would apply only to situations where the taxpayer had recourse to either the Tax Court or Federal district courts through a suit for refund or to prevent assessment of taxes (S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1939-1 Cum. Bull. (Part 2) 651, 657)):

<sup>\*</sup> This very line of decisions might be considered dispositive in the case *sub judice*, since it is not the respondent's income taxes that are in issue here.

"Your committee believes that...existing procedure both in the Board of Tax Appeals [now Tax Court] and the courts affords ample remedies for the correction of tax errors."

Thus, Congress premised this provision on the assumption that there was adequate and timely access to the courts. Where such access is lacking, the entire purpose of the statutory clause is clearly inapplicable. Considering the Constitutional problems raised by a denial of any practical access to judicial relief, it is extremely doubtful that Congress intended the statutory bar to apply in such circumstances. The Internal Revenue Code carefully gives every taxpayer at least one timely opportunity to litigate his case. Indeed, it would appear to be petitioner's position that only here, where Constitutional issues are foremost, Congress did not intend to permit effective access to a judicial forum. Such an anomalous result should not be lightly attributed to Congress.

**(2) Respondent Lacked Effective Access To Any Other Judicial Tribunal.**

The action of petitioner in granting respondent § 501(c)(4) status precluded the respondent from contesting the petitioner's revocation of respondent's § 501(c)(3) status both in the Tax Court (because of the absence of a deficiency) and the Federal district courts (because there would be no income tax due on which to claim a refund).

However, petitioner asserts that respondent theoretically has access to the courts either through a suit for refund of Federal unemployment taxes (for which certain § 501(c)(4) organizations, but not § 501(c)(3) organizations, are liable) or through the technique of having a "friend" make a contribution to the organization and thereafter contest its disallowance as a deduction. These suggestions are simply unrealistic.

The courts have held that mere theoretical access to the judiciary is insufficient to invoke the bar of 26 U.S.C. § 7421(a); rather, the test is the practical availability of such access. Thus, in *Schreck, supra*, the court relied on the lack of practical access to a tribunal as the basis for its grant of an injunction. Similar reasoning was used in the bankruptcy cases, *supra*, where a refund suit is, as a practical matter, prevented by the probable lack of sufficient assets remaining in the hands of the bankrupt to pay the full tax. In effect, these cases hold that the ability to sue for a refund must be realistic, practical and available, not merely theoretic and remote.

Petitioner contends that respondent could obtain a decision with respect to its § 501(c)(3) status by litigating its liability for Federal unemployment taxes. That, however, is an impractical suggestion because it does not afford the taxpayer timely access to the courts. First, such a suit could not be instituted until after the respondent had filed a claim for refund with the Internal Revenue Service and the claim was either denied or six months passed without IRS action thereon. It is also certainly conceivable that the IRS might allow the claim for refund without specifying its reason therefor, thereby leaving respondent without even that theoretical avenue to judicial review of the administrative revocation of its § 501(c)(3) status. Just such an approach was used in *Church of Scientology of Hawaii v. U.S.*, \_\_\_\_ F.2d \_\_\_\_ (9th Cir. 1973) (32 A.F.T.R. 2d 73-5784); see, also, *Mitchell v. Riddell*, 402 F.2d 842 (9th Cir.), *cert. denied*, 394 U.S. 456 (1969).

Moreover, even if the petitioner did permit the respondent ultimately to litigate its liability for unemployment taxes through a refund suit, such a suit could not be commenced until six months after the close of the taxable year in which the issue arose, or as much as eighteen months after the organization's § 501(c)(3) status was revoked. Thereafter, there would be further delay until judgment was rendered in that litigation. During this entire period of time, contributions to the



organization—its very lifeblood—would undoubtedly be reduced to a mere trickle, if that much, thereby effectively precluding the organization from continuing during that time to exercise its Constitutionally protected rights.

Furthermore, it should be noted that it is possible that a § 501(c)(4) organization might be entirely exempt from Federal unemployment taxes. For example, the organization may have no employees to which it paid “wages” of at least \$1,500 in any calendar quarter in the calendar year or preceding calendar year. See, 26 U.S.C. § 3306(a) and (c). In such instance, petitioner’s suggested avenue for access to judicial review of its *ex parte* action evaporates into thin air. Reliance upon a possible liability for Federal unemployment taxes hardly suffices as an adequate procedure for determining § 501(c)(3) status.

Petitioner’s suggestion of a so-called “friendly” refund suit is even more fanciful. It would be hard to find an individual who is so “friendly” that he would voluntarily file a refund claim, thereby exposing his entire personal income tax return to an IRS audit. A refund claim normally precipitates a search by the IRS for other unrelated issues in order to obtain set-offs. See, e.g., *Lewis v. Reynolds*, 284 U.S. 281 (1932); *U.S. v. Pfister*, 205 F.2d 538 (8th Cir. 1953); *Larrabee v. U.S.*, 37 F.R.D. 61 (S.D. Cal. 1965); *Pacific Mills v. Nichols*, 31 F. Supp. 43 (D. Mass. 1939). A refund claim would thus bring into question each and every item on the “friend’s” personal income tax return. The investigation initiated by the refund claim could well extend into other taxable years and result in the possible imposition of an assessment for additional taxes for entirely unrelated items. The “friend” of the tax-exempt organization may thus find himself personally liable for amounts or penalties far larger than the minimal amount he contributed to the tax-exempt organization. Few individuals are sufficiently “friendly” to volunteer for such treatment.



To summarize, in ascertaining whether there is "accessibility", it is necessary to weigh heavily the practicalities. This is particularly important where denial of accessibility results in the unnecessary suspension of Constitutional rights. In cases such as the one *sub judice*, an action for injunctive relief is the only practical avenue to the judiciary.

**(3) The Inability To Exercise Constitutionally Protected Freedoms For An Inordinate Period Of Time Is A Very Special And Extraordinary Circumstance.**

Special recognition must be given to organizations which, like the respondent and *amici*, exist solely for the purpose of protecting or exercising Constitutional rights. The denial of a Constitutional freedom for even one day is intolerable where the denial is unnecessary and avoidable. If petitioner is to prevail in his contention that respondent may contest the Government's actions only in a suit for a refund of unemployment taxes (or similar method), respondent's right to exercise its Constitutionally protected rights will be suspended pending final determination of the litigation. Such restriction is not unavoidable and petitioner has cited no justification for it. The threat of an indeterminate suspension of Constitutional rights is so alarming as to constitute special and extraordinary circumstances within the meaning of this Court's prior decisions.

**(4) The *Enochs v. Williams Packing* Test Is Satisfied.**

Petitioner contends that respondent in this action fails to satisfy the two-part test of *Enochs v. Williams Packing & Navigation Co.*, *supra*, and that such failure is dispositive of this action.

First, nothing in *Williams Packing* suggests that the test it established is exclusive in all contexts. This Court was there

considering a case involving employees' withholding tax liabilities. Liability for the tax depended on whether certain fishermen were employees or independent contractors. This issue could have been litigated in a refund suit brought by the same taxpayer involving precisely the same taxes (not some collateral or unrelated tax). The effect of an injunction would have been exactly what 26 U.S.C. § 7421(a) was designed to prevent—an interference with the collection of taxes assessed against the taxpayer itself and a predetermination of the tax liability. The "central purpose of the act" would have been frustrated by the granting of an injunction. In that context, this Court ruled that an injunction would be justified only if, as in *Standard Nut Margarine, supra*, it was clear that the Government could not prevail and there would be irreparable injury. But *Williams Packing* in no way extended the thrust of 26 U.S.C. § 7421(a) to situations which it does not cover, *i.e.*, where the primary issue is not the taxes of the complainant. Nor did it purport to apply that statute to an action whose primary purpose is the preservation of basic Constitutional rights. In such cases, the central purpose of the statute is, as previously stated herein, inapplicable and *Williams Packing* simply is no authority for the application of the statute to such situations. *McGlotten v. Connally, supra; Green v. Kennedy, supra.*

Accordingly, the *Williams Packing* test need not be satisfied in this kind of case. Nevertheless, if the *Williams Packing* test is applicable, respondent in any event satisfies ~~them~~ *it*.

The controversy in *Williams Packing* was essentially factual. Consequently, the outcome could not have been resolved on a motion for summary judgment. Rather, the case would have had to be tried to determine the facts. This Court, stating that an injunction would not be granted unless it was clear that upon "the most liberal view of the law and the facts" the Government could not prevail, dismissed the complaint.

It is common for many procedural purposes (*e.g.*, a motion to dismiss a complaint for failure to state a cause of action

or a motion for summary judgment) for a court to determine whether there are sufficient facts to support the position of the moving party. Generally, the court assumes that any facts in controversy would be resolved against the moving party. In that context, it is appropriate to say that the court will take a "liberal" view of the facts alleged by one of the parties in the case, and a "strict" view of the facts alleged by the other party.

But a court cannot take either a "liberal" or "strict" view of the law. For a court, there can be only one view of the law—the correct view. It is the function of a court to determine and apply the law without being either "strict" or "liberal".

Where, as here, the facts are uncontroverted, the concept of "liberal" and "strict" becomes irrelevant. Rather, the court should determine how the law applies to such facts. If the law supports the complainant, then the Government cannot prevail and the *Williams Packing* test is satisfied. If, on the other hand, the correct view of the law supports the Internal Revenue Service, then it is clear that the complainant cannot prevail and the *Williams Packing* test would not be met.

On this basis, where the facts, as here, are uncontroverted, and where substantial Constitutional issues are raised, the court must of necessity decide the substantive legal issue in determining whether the *Williams Packing* test has been satisfied. In effect, in such a case the court should view the action as a motion for summary judgment and decide the case on that basis. Such an approach would result in a rapid judicial disposition of the case with a minimum of administrative inconvenience and potential revenue loss, while at the same time affording a rapid resolution of the Constitutional questions raised therein.

### CONCLUSION

At issue here is the basic right of tax-exempt organizations to speedy judicial review of an *ex parte* revocation

by petitioner of the organization's § 501(c)(3) status, where the effect of precluding such review might very well mean the demise of the organization and its ability to Conduct Constitutionally protected activities. *Amici* firmly believe that basic principles of due process and equal protection, together with the other reasons set forth herein, grant this right.

Respectfully submitted,

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I, MARTIN B. COWAN, certify that this Motion for Leave to File a Brief Out of Time and Brief of the National Jewish Commission on Law and Public Affairs as Amicus Curias, was served upon FRANK C. SALISBURY, ESQ., 919 18th Street, NW, Room 800, Washington, District of Columbia 20006, attorney for "Americans United" Inc., etc., et al, Respondents, and upon the HON. ROBERT H. BORK, U. S. Department of Justice, Washington, District of Columbia 20539, Attorney for Donald C. Alexander, Commissioner of Internal Revenue, Petitioner, by depositing a true copy of same enclosed in a postage prepaid properly addressed wrapper in a branch of the United States Post Office on this 13th day of December, 1973.

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**In the Supreme Court of the United States**  
OCTOBER TERM, 1973

BOB JONES UNIVERSITY, PETITIONER

v.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY OF  
THE UNITED STATES, AND DONALD C. ALEXANDER,  
COMMISSIONER OF INTERNAL REVENUE

DONALD C. ALEXANDER, COMMISSIONER OF  
INTERNAL REVENUE, PETITIONER

v.

"AMERICANS UNITED" INC., ETC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURTS OF APPEALS FOR THE FOURTH AND  
DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR THE RESPONDENTS IN NO. 72-1470 AND  
REPLY BRIEF FOR THE PETITIONER IN NO. 72-1371

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v.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY OF  
THE UNITED STATES, AND DONALD C. ALEXANDER,  
COMMISSIONER OF INTERNAL REVENUE

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No. 72-1371

DONALD C. ALEXANDER, COMMISSIONER OF  
INTERNAL REVENUE, PETITIONER

v.

"AMERICANS UNITED" INC., ETC., ET AL.

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*ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURTS OF APPEALS FOR THE FOURTH AND  
DISTRICT OF COLUMBIA CIRCUITS*

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**BRIEF FOR THE RESPONDENTS IN NO. 72-1470 AND  
REPLY BRIEF FOR THE PETITIONER IN NO. 72-1371**

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### OPINIONS BELOW

The findings of fact, conclusions of law, and preliminary injunction order of the district court (App. A114-A129)<sup>1</sup> are reported at 341 F. Supp. 277. The opinion of the court of appeals (App. A132-A140) is reported at 472 F. 2d 903. The opinion of the court of appeals denying rehearing (App. A150-A151) is reported at 476 F. 2d 259.

### JURISDICTION

The judgment of the court of appeals was entered on January 19, 1973.<sup>2</sup> Petitioner's petition for rehearing *en banc* was denied on March 21, 1973 (App. A150-A151). The petition for a writ of certiorari was filed on April 30, 1973, and was granted on October 9, 1973.<sup>3</sup> The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Petitioner is a non-profit private sectarian university which does not admit black students. In 1942, the Internal Revenue Service had given it an advance ruling that petitioner was exempt from income tax pursuant to Section 501(c)(3) of the Internal Revenue Code of 1954 and assuring that gifts to it would

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<sup>1</sup> "App." references are to the record appendix filed by petitioner in No. 72-1470.

<sup>2</sup> The judgment was not included in the record appendix.

<sup>3</sup> The order granting the writ of certiorari was not included in the record appendix.



be deductible as charitable contributions under Section 170(a). In 1971, the Commissioner proposed to withdraw this ruling because of petitioner's racially discriminatory admissions policy. The question presented is:

Whether petitioner is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a), and the Declaratory Judgment Act, 28 U.S.C. 2201-2202, from obtaining injunctive or declaratory relief restraining the Commissioner from withdrawing the ruling respecting petitioner's tax-exempt status and deductibility of contributions made to it.

#### STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Internal Revenue Code, including the Anti-Injunction Act, and the Declaratory Judgment Act, are set forth in Appendix A, *infra*, pp. 42-46.

#### STATEMENT

This case and *Alexander v. Americans United, Inc.*, No. 72-1371, October Term, 1973, present the identical question whether the Anti-Injunction and Declaratory Judgment Acts bar suits to restrain the Internal Revenue Service's withdrawal of rulings recognizing tax exempt status and eligibility for tax deductible contributions. Because of the common issue in both cases, the Court has scheduled oral arguments in this case in tandem with that in No. 72-1371. In order that the Court may consider the single legal issue involved in the factual context of both cases, this

document contains both the brief for the respondents in No. 73-1470 and the reply brief for the petitioner in No. 72-1371. Although the statement of facts set forth below concerns only petitioner Bob Jones University, we will present argument here with respect to both cases.\*

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Petitioner is an eleemosynary South Carolina Corporation engaged in religious and educational activities in Greenville, South Carolina. It has chosen the field of education, principally at the college level, as the vehicle for teaching and propagating its fundamentalistic religious beliefs (App. A5, A114-A115). As stated in its charter (App. A115), petitioner's purposes are to "conduct an institution of learning for the general education of youth \* \* \* giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures [and] combatting all atheistic, agnostic, pagan, and so-called scientific adulterations of the Gospel \* \* \*."<sup>5</sup>

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\* A copy of the government's opening brief filed in No. 72-1371 and the record appendix in that case will be served on petitioner Bob Jones University, together with this brief. "R." references are to the record appendix in No. 72-1371.

<sup>5</sup> In order to achieve its stated purposes, petitioner requires its students to attend daily chapel services. All classes and meetings held begin and end with prayers. Most students are required to enroll in one religion class each semester. All faculty members are required to teach and adhere to the religious beliefs and principles of the school, and any member of the faculty or student body who teaches or promotes religious beliefs to the contrary is subject to dismissal (App. A116).

One of petitioner's religious beliefs is that God intended the various races of men to live separate and apart, and that intermarriage of different races is contrary to God's will and the Scriptures<sup>6</sup> (App. A5, A16, A115). In keeping with its belief, petitioner has refused to admit unmarried blacks as students in the University. No student is permitted to date or marry outside his own race<sup>7</sup> and petitioner believes that it would be impossible to enforce this rule if it were to adopt a racially non-discriminatory admissions policy (App. A64-A65, A115-A116).<sup>8</sup>

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<sup>6</sup> The affidavit of petitioner's president, Dr. Bob Jones III, and the attached sermon, "Is Segregation Scriptural?", presents a detailed explanation of this belief (App. A14-A37).

<sup>7</sup> Petitioner's president explained the connection between its racially discriminatory admissions policy and interracial dating and marriage, as follows (App. A64):

We accept a few Oriental students, but we do so with a definite understanding that they will not date outside of their own race. If we took Negro students here on this same basis today, they would resent that restriction and would cry that they were being discriminated against because they were not allowed to date Orientals or Caucasians. If we had to expel a black student today for the worst possible offense—stealing, attempted rape, or something of that sort—he would cry that he was being persecuted because he was black; and we would be picketed, annoyed, and harassed.

<sup>8</sup> A further consequence of petitioner's discriminatory admissions policy is its ineligibility, since August 26, 1968, to receive grants from the federal government because it has refused to sign the Statement of Compliance prescribed by Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d and 45 C.F.R. § 80.4(d) (1). Dept. of Health, Education, and

Since 1942, the Internal Revenue Service had determined that petitioner and its predecessor organization Bob Jones College were eligible for tax-exempt status and could receive tax-deductible contributions. On July 10, 1970, however, the Internal Revenue Service announced publicly that it could no longer legally justify its prior allowance of tax-exempt status to private schools maintaining racially discriminatory admissions policies nor could it continue to treat gifts to such schools as deductible charitable contributions for income tax purposes (App. A39-A40, A133). This action was taken after an intensive study of the question by the Department of Justice and of the Treasury Department (App. A81).<sup>9</sup>

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Welfare, *Status of Title VI Compliance Interagency Report*, Cum. List No. 296 (Nov. 1, 1973), p. 4. In addition, petitioner is presently challenging the action of the Veterans Administration terminating tuition and other payments to veterans attending Bob Jones University on the ground of its racially discriminatory policies. *Bob Jones University v. Johnson*, Civil No. 72-1325 (D. S.C.).

<sup>9</sup> As a result of this change in policy, which was formally published in Rev. Rul. 71-447, 1971-2 Cum. Bull. 230, the Internal Revenue Service did not appeal from the order of a three-judge district court in *Green v. Connally*, 330 F. Supp. 1150 (D. D.C.), prohibiting the issuance of tax-exempt status and deductibility of contributions with respect to private schools in Mississippi maintaining racially discriminatory admissions policies. That suit had been brought by a group of Mississippi black parents and their children. In response to an appeal of the decision by a group of white intervenors seeking reversal by this Court on First Amendment freedom of association grounds, the government filed a motion to dismiss. This Court affirmed without opinion. *Coit v. Green*, 404 U.S. 997.

On November 30, 1970, the Internal Revenue Service sent a letter of inquiry to each private school in the United States, including petitioner, which had an individual tax-exemption ruling. The letter announced that the Internal Revenue Service's position is that private schools with racially discriminatory admissions policies are not legally entitled to tax exemption and that contributions to such schools are not deductible as charitable contributions. The letter stated that all rulings and determinations issued to private schools would be reviewed in light of this position. Each school was therefore asked to furnish specific information regarding its admissions policy within thirty days (App. A37-A39, A52).<sup>10</sup> On December 30, 1970, petitioner advised the Internal Revenue Service that it did not admit black students (App. A56-A59).

During the next nine months, petitioner's attorneys met and communicated with various high officials of the Internal Revenue Service, including the Commissioner, Randolph W. Thrower, and his successor, Johnnie M. Walters.<sup>11</sup> Throughout this period, pe-

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<sup>10</sup> On December 9, 1970, after receipt of the letter of inquiry from the Internal Revenue Service, petitioner advised its contributors that it was going to "stall" responding to the request for information concerning its racial policies as long as possible. It urgently asked its contributors to make the largest possible donations in order to avail themselves of the deductibility assurance before it was withdrawn (App. A62).

<sup>11</sup> At a meeting with officials of the Internal Revenue Service on April 21, 1971, petitioner's representatives sought and obtained additional time in which to confer with University officials respecting a possible change in the admissions policy

tioner refused to change its racially discriminatory admissions policies and the Internal Revenue Service adhered to its view that such practices precluded tax-exempt status. These discussions terminated in early September 1971, when petitioner notified the Commissioner that it did not intend to alter its racially discriminatory admissions policy (App. A52-A53).

The Commissioner thereupon determined to instruct the District Director to commence the administrative procedures which are followed by the Internal Revenue Service when the tax-exempt status of an organization is called into question. Those procedures allow the organization an opportunity to confer with the staff of the District Director and, if necessary, to file a written protest. The organization is also permitted to confer with officials of the Internal Revenue Service at the National Office in Washington before any final decision is made. Prior to a final decision, the Internal Revenue Service will not conduct an audit of an organization's records or issue

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(App. A46). On July 29, 1971, petitioner's attorney advised an assistant to the Commissioner that the admissions policy would not be changed. Nevertheless, he sought and obtained an additional conference with the Internal Revenue Service. On September 8, 1971, Commissioner Walters personally met with petitioner's attorneys and advised them that he intended to instruct the District Director to begin the formal administrative proceedings for the purpose of determining whether to withdraw the tax exemption and deductibility assurance ruling (App. A47-A49, A52-A54, A117).

any notice of proposed deficiency either against the organization or a contributor.<sup>12</sup>

Before these administrative procedures could be initiated, however, petitioner brought this action on September 9, 1971, seeking a preliminary and final injunction restraining the Commissioner from withdrawing the ruling with respect to its tax-exempt status and deductibility of contributions made to it (App. A52-A53).<sup>13</sup> The immediate effect of this suit was to preclude the application of the above-described administrative procedures (App. A7).

The district court granted petitioner's request for injunctive relief *pendente lite* (App. A128-A129). The district court ruled that the diminution of contributions following withdrawal of the ruling with respect to their deductibility would cause petitioner irreparable injury. The Court held that the Anti-Injunction Act, which prohibits suits "for the purpose of restraining the assessment or collection of any tax," was not applicable because, *inter alia*, the suit challenged the constitutionality, rather than the ap-

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<sup>12</sup> A detailed description of these procedures is set forth in Rev. Proc. 69-3, 1969-1 Cum. Bull. 389, which has been superseded by Rev. Proc. 72-4, 1972-1 Cum. Bull. 706 (tax exemption), and Rev. Proc. 68-17, 1968-1 Cum. Bull. 806, now superseded by Rev. Proc. 72-39, 1972-2 Cum. Bull. 818 (deductibility assurance).

<sup>13</sup> If the District Director had been instructed to commence the prescribed administrative procedures, the affidavit of William H. Connett, Assistant to the Commissioner of Internal Revenue, describes how they would have been applied with respect to petitioner (App. A53-A56).

plicability of the non-discrimination requirement. (App. A121-A128).

The court of appeals reversed, concluding that the Anti-Injunction Act barred the suit, notwithstanding the acknowledged injury which would result from the withdrawal of petitioner's ruling with respect to deductibility of contributions (App. A134-A138).

### SUMMARY OF ARGUMENT

#### A

Two acts of Congress, the Anti-Injunction Act and the Declaratory Judgment Act, have recognized that the prompt and efficient collection of the federal revenues is a paramount national concern. These statutes respectively prohibit the federal courts from granting injunctions against the assessment or collection of taxes or declaratory relief with respect to federal taxes. As this Court has observed, such statutes reflect the desire of Congress to avoid the possibility that the courts could interfere with the orderly process of collecting the revenues upon which the government depends for its continued existence.

One narrow exception, created by a decision of this Court, exists to the otherwise broad restriction against injunctive relief in federal tax cases. In *Enochs v. Williams Packing Co.*, 370 U.S. 1, the Court unanimously held that a taxpayer seeking an injunction against the collection of taxes must satisfy a twofold test. First, he had to demonstrate that under no circumstances could the government prevail on the merits of its claim. Secondly, he must show



that collection of the tax will result in an irreparable injury for which there is no adequate legal remedy.

It is against this deeply rooted policy of barring the federal courts from exercising their equity powers to encroach upon the administrative determination process necessary for revenue collection that this case and its companion in No. 72-1371 must be viewed. In 1942, the Internal Revenue Service had determined that Bob Jones University and its predecessor organization were eligible for tax-exempt status and could receive tax-deductible contributions. In 1970, however, the Internal Revenue Service, after an intensive study of the question, announced that it could no longer legally justify its prior allowance of such tax treatment to private schools maintaining racially discriminatory admissions policies.

In response to a formal inquiry by the Internal Revenue Service, Bob Jones University stated that it did not and would not admit blacks as students. During repeated conferences between representatives of the University and high officials of the Internal Revenue Service, the University refused to alter its racially discriminatory policy. Despite this firmly stated position by the University, the Internal Revenue Service was nevertheless prepared to follow its prescribed administrative procedures providing for still additional conferences prior to making a final decision with respect to the withdrawal of the ruling. Before the Internal Revenue Service could invoke this procedure, however, the University commenced its suit to restrain the Commissioner from withdrawing the ruling.

The Anti-Injunction Act bars this suit. The Act bars any suit "for the purpose of restraining the assessment or collection of any tax \* \* \*." This is such a suit because any restraint upon the Commissioner's withdrawal of a ruling granting tax-exempt status and eligibility to receive deductible contributions will prevent the assessment of taxes against the recipient organization and its donors who have claimed deductions for charitable contributions. Indeed, the operation of the injunction of the district court had that very effect in this case.

The University, however, claims that this is not a tax case but the use of the taxing power to force it to alter its racially discriminatory admissions policy. But that contention ignores the undisputed fact that the taxes which would have been assessed and collected are income and unemployment taxes, plainly revenue producing in character. Moreover, for purposes of the Anti-Injunction Act, this Court has held that there is no distinction between revenue-producing taxes and those levies which are arguably regulatory.

The position of the Internal Revenue Service that private schools which maintain racially discriminatory admissions policies are ineligible for tax-exempt status is amply supported by decisions of this Court and Acts of Congress evidencing a strong national policy against segregation in public education and prohibiting governmental assistance to private institutions which maintain exclusionary policies based upon race. Moreover, a three-judge district court has specifically held that private schools which, like Bob Jones Uni-

versity, exclude blacks from enrollment, are not eligible for tax-exempt status or to receive deductible contributions. While the correctness of this conclusion appears inescapable, the merits of the Internal Revenue Service's policy with respect to discriminatory private schools is not at issue here. In light of the authorities, however, the University cannot demonstrate that under no circumstances would the government prevail on the merits of its claim pursuant to the first aspect of the *Williams Packing* test. On this basis, the Fourth Circuit correctly refused to enjoin the Commissioner from withdrawing the University's ruling.

### B

Although the Fourth Circuit did not reach the question whether the University had adequate legal means to challenge the Commissioner's proposed action, there were three legal remedies available. These were a ~~refund suit for unemployment (F.U.T.A.) taxes~~, a refund suit by the University for unemployment (F.U.T.A.) taxes, a refund or a Tax Court suit by the University with respect to income taxes, and an action by a contributor either in a refund or a Tax Court suit to test his right to a deduction for a charitable contribution. Such proceedings are all fully adequate methods to obtain judicial review of the question.

That organizations such as the University and Americans United may suffer a decrease in contributions from a revocation of their tax-exempt status is a consequence of the fact that litigation does not

instantly resolve these questions. In light of the policy of the Anti-Injunction and Declaratory Judgment Acts to protect the revenue collection process, it seems highly unlikely that the Congress intended organizations such as the University and Americans United to preserve their tax benefits and those of their contributors *pendente lite*. But the preliminary relief sought by both of these organizations would have this effect in derogation of the revenue. As this Court observed in *Williams Packing*, where the taxpayer similarly could not demonstrate that under no circumstances would the government prevail, such injunctive suits "may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise" (370 U.S. at 6).

Finally, when viewed against the background of the entire rulings program of the Internal Revenue Service, there is little justification for allowing injunctive relief with respect to questions involving exempt status and deductibility of contributions. The congressional policy against injunctions is equally applicable to all federal tax controversies. If the courts could grant injunctive relief with respect to the issuance or withdrawal of such rulings, it would seriously impair the administration of the entire rulings program in which the Internal Revenue Service issues decisions on the tax consequences of a wide variety of transactions. Judicial intervention would eliminate the necessary discretion which must be exercised if the rulings program is to be effective. The rationale of the District of Columbia Circuit's

modification to the *Williams Packing* standard cannot be logically limited to questions involving tax-exempt status rulings. Hence, it threatens the continued effectiveness of the entire rulings program of the Internal Revenue Service. If changes of such a fundamental character in the administration of the tax laws and the *Williams Packing* rule are to be forthcoming, they should be made by Congress and not by the courts.

#### ARGUMENT

**THE COURTS HAVE NO JURISDICTION TO ENTERTAIN SUITS FOR INJUNCTIVE AND DECLARATORY RELIEF RESPECTING THE COMMISSIONER'S REVOCATION OF RULINGS DETERMINING TAX-EXEMPT STATUS AND DEDUCTIBILITY OF CONTRIBUTIONS.**

**A. Bob Jones University's suit was barred by the Anti-Injunction Act.**

**1. *Judicial review of tax decisions is available only within the statutory scheme provided by Congress.***

The federal Anti-Injunction Act provides, with exceptions not here relevant, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person \* \* \*." The statute was enacted in 1867<sup>14</sup> in order to prevent the same type of injunctive suits which had swept over the state taxation systems from similarly inundating the federal tax system. This Court thereafter recognized the congressional policy which underlay the passage of the Act, namely, that

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<sup>14</sup> The statute originated as Section 10 of the Act of March 2, 1867, c. 169, 14 Stat. 471, and is now codified as Section 7421(a) of the Internal Revenue Code of 1954.

if the courts exercised general injunctive power with respect to the collection of taxes, the very existence of government would be threatened. See *State Railroad Tax Cases*, 92 U.S. 575, 613; *Cheatham v. United States*, 92 U.S. 85, 89; *Snyder v. Marks*, 109 U.S. 189, 193-194.<sup>15</sup> The barring of such suits is necessary to enable the Treasury Department effectively to discharge its duty of "superintend[ing] the collection of the revenue \* \* \*" which the First Congress delegated to it.<sup>16</sup> This includes a wide variety of administrative acts, including the acceptance of tax returns for filing, audits of returns, and promulgation of regulations and revenue rulings.

While Congress has foreclosed injunctive actions to restrain the assessment and collection of taxes, it has established a statutory scheme which generally provides taxpayers with two methods of obtaining judicial review of certain types of actions taken by the Treasury. First, with respect to income, estate and gift taxes, a taxpayer may obtain review of a notice of deficiency without having to pay the disputed amount by filing a timely petition in the Tax Court. Sections 6212 and 6213 of the Internal Revenue Code of 1954.<sup>17</sup> Alternatively, a taxpayer may

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<sup>15</sup> These cases and the historical background of judicial review in tax cases are discussed in greater detail at pp. 13-17 in our brief in No. 72-1371.

<sup>16</sup> Act of September 2, 1789, c. 12, 1 Stat. 65. See currently, Revised Statutes § 248 (31 U.S.C. 1002).

<sup>17</sup> The existence of the Tax Court review procedure does not conflict with the government's fundamental right to assess and collect taxes prior to litigation. Under the jeopardy assessment procedures of Section 6861, the Commissioner

pay the disputed amount of any type of tax, file a claim for refund, and obtain judicial review of the Treasury's denial of the claim (or its failure to act on the claim within six months) by a suit for refund in a district court or in the Court of Claims. Sections 6532 and 7422 of the Code; 28 U.S.C. 1346 and 1491.

These statutory methods of judicial review provide a workable system for the courts to resolve tax controversies between taxpayers and the government. Common to both methods, however, is the requirement that there be a concrete dispute over a specific amount of money, either by way of deficiency or claimed refund. The system does not comprehend the judicial resolution of abstract tax controversies in advance of an assertion by the Treasury against a taxpayer that a particular amount is owed.

The statutory prohibition on injunctions against tax assessment or collection activities by the Treasury is subject to one narrowly limited exception created by this Court. In *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7, the Court unanimously held that a taxpayer might obtain an injunction against assessment or collection of taxes only if he satisfied a two-fold test: first, he must show that "it is clear that under no circumstances could the Government ultimately prevail" on the merits of its legal claim; secondly, he must show that "equity jurisdiction

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may assess and collect taxes at any time before or during Tax Court proceedings if he "believes that the assessment or collection \* \* \* will be jeopardized by delay \* \* \*."

otherwise exists" because of the threat of irreparable injury for which there is no adequate legal remedy.<sup>18</sup> The applicability of that exception is at issue here.

*Williams Packing* held that a claim of irreparable injury, without more, cannot justify injunctive relief, preliminary or otherwise, against the assessment and collection activities of the Treasury. There, the taxpayer sought an injunction against the collection of social security and unemployment taxes claimed by the Internal Revenue Service to be past due. The taxpayer asserted that collection of the taxes would cause it irreparable injury. The Court, however, held that "such a suit may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise" (370 U.S. at 6). It observed that the manifest purpose of the Anti-Injunction Act is "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal rights to the disputed sums be determined in a suit for refund" (370 U.S. at 7).

Because the record revealed that "the Government's claim of liability was not without foundation" (370 U.S. at 8), there was no need for the Court to determine whether a refund suit presented taxpayer with an adequate legal remedy. No suit for an injunction could be maintained because it was not apparent "under the most liberal view of the law

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<sup>18</sup> In *Williams Packing*, the Court clarified the "exceptional circumstances" test announced in *Miller v. Nut Margarine Co.*, 284 U.S. 498.



and the facts, [that] the United States [could] not establish its claim" (370 U.S. at 7).

Similarly, here, it is beyond question that Bob Jones University cannot satisfy the first condition of the twofold *Williams Packing* test. As we shall demonstrate below, it is not clear that under no circumstances the government cannot ultimately prevail in its claim that the University's racially discriminatory policy removes it from the tax-exempt status granted by Code Section 501(c)(3) to organizations "organized and operated exclusively for religious, charitable \* \* \* or educational purposes \* \* \*." Thus, its claim that the proposed withdrawal of its tax ruling will cause it irreparable injury through decreased contributions cannot support a suit for injunctive relief restraining the Commissioner from withdrawing its ruling.

The University's failure to meet this aspect of the *Williams Packing* test is in itself sufficient to bar its suit for injunctive relief and this was the ground of the Fourth Circuit's decision.<sup>19</sup> We shall also show

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<sup>19</sup> Although the government argued in the Fourth Circuit that the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201-2202, offered an independent basis for concluding that the courts have no jurisdiction to enjoin the Commissioner with respect to the withdrawal and issuance of tax rulings, the court relied only upon the Anti-Injunction Act. For the reasons set forth at pages 37-42 in our brief in No. 72-1371, we believe that the bar in 28 U.S.C. 2201 against any declaratory suit "with respect to Federal taxes" is an independent statutory prohibition against the type of suit brought by both Bob Jones University and Americans United. Neither of them, however, has made any argument with respect to the

that the University had adequate legal remedies available to challenge the action of the Commissioner.<sup>20</sup> There are at least two, and probably three, fully adequate legal means by which the University could have litigated its eligibility for tax deductible contributions. On either basis, therefore, the Commissioner could not be enjoined from withdrawing the tax ruling respecting the University's tax exempt status and deductibility of contributions made to it.

Finally, we submit that there is no basis for expansion of the *Williams Packing* rule to encompass injunctive actions with respect to the rulings of tax-exempt organizations. The policy against allowing the judicial branch to interfere with the orderly collections of revenues is equally applicable to disputes involving claimed exemptions as it is to any other type of tax controversy.

**2. *Bob Jones University's suit for injunctive relief is prohibited by the express terms of the Anti-Injunction Act.***

a. Before considering whether Bob Jones University can meet the twofold test established by this

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Declaratory Judgment Act except the erroneous contention that the two statutory provisions are coterminous. See our brief in No. 72-1371 at pages 40-42. (See University Br. 13, n. 3; Americans United Br. 6, n. 5). We therefore confine our discussion in this brief to the Anti-Injunction Act.

<sup>20</sup> Without considering the legal remedies available to the University, the Fourth Circuit deemed the loss of contributions which would have resulted from the loss of its ruling to be an irreparable injury within the meaning of *Williams Packing* (App. A136).

Court's *Williams Packing* decision, we examine the facts of its case in relation to the statutory language of the Anti-Injunction Act. In 1942, the University (then Bob Jones College) received an advance letter ruling from the Internal Revenue Service advising that it was exempt from income taxes under the predecessor of Code Section 501(c)(3), Appendix, *infra*, pp. 43-44, and that contributions to it would be deductible by the donors under the predecessor of Section 170(c)(2), Appendix, *infra*, pp. 42-43. Since all organizations exempt from tax under Section 501(c)(3) are also exempt from federal unemployment taxes under Code Section 3306(c)(8), Appendix, *infra*, pp. 44-45, the letter ruling necessarily assured the University that it would not be liable for unemployment taxes as well.

In 1971, the Internal Revenue Service proposed to withdraw this letter ruling because of the University's discriminatory admissions policy. This action was the result of a change in policy initiated only after the most intensive study by both the Departments of Justice and the Treasury. Despite the repeated statements made by representatives of the University in numerous preliminary conferences with Internal Revenue Service officials that it refused to alter its racially discriminatory admissions policy, in September, 1971, the Internal Revenue Service was nevertheless prepared to follow the prescribed administrative procedures providing for conferences and receipt of written submissions prior to rendering a final decision respecting the University's tax ruling.

But before these procedures could be commenced, the University initiated this suit for injunctive relief. As a result, the Internal Revenue Service has not yet taken any action altering the University's tax status.<sup>21</sup>

Can it be seriously doubted that the order of the district court was an injunction against "the assessment or collection of any tax" within the meaning of the Anti-Injunction Act? The answer, we submit, is plainly no. Assuming that the Internal Revenue Service had been permitted to pursue its procedures and that the University's ruling had been ultimately withdrawn, contributors to the University would have become liable for income tax deficiency assessments for any charitable deductions taken with respect to contributions made after suspension of the deductibility assurance aspect of the ruling. More-

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<sup>21</sup> Although the court of appeals reversed the district court's order granting a preliminary injunction against the Commissioner (App. A137-A140) and the Chief Justice denied the University's application for a stay of the mandate on April 3, 1973 (App. A156), the district court's order has never been dissolved. On April 2, 1973, the University filed a motion in the district court seeking to prevent the dissolution of the preliminary injunction insofar as it prevented the Internal Revenue Service from suspending the aspect of the ruling assuring the deductibility of contributions. The government opposed this motion on the ground that it was contrary to the mandate of the court of appeals and requested prompt dissolution of the injunction. The district court, however, took no action. On October 12, 1973, it informed the parties that it would not act upon the government's request that the order be formally dissolved because the grant of the writ of certiorari had, in its view, deprived it of any further jurisdiction.

over, the University itself would have become liable for the payment of income taxes<sup>22</sup> and federal unemployment taxes. But the preliminary injunction issued by the district court has resulted in unwarranted claims of charitable deductions by the University's contributors as well as the avoidance of tax liability by the University itself.<sup>23</sup> The Internal

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<sup>22</sup> Most educational institutions operate at a loss and the lack of an exemption from income taxes would not result in any income tax liability. However, the affidavit of the University's accountant states that the federal income tax liability of the University for its taxable years ended May 31, 1971 and May 31, 1972, would have been \$750,000 and in excess of \$500,000, respectively (App. A43-A44).

<sup>23</sup> Because Bob Jones University brought its action for injunctive relief before the Internal Revenue Service could withdraw its tax ruling, it sought to restrain the Commissioner from revocation of the ruling. This relief differs from that sought by Americans United, whose ruling had already been revoked by the Internal Revenue Service. As a result, that organization sued to have its ruling reinstated. Since Americans United asked for affirmative action by the Commissioner, the government raised the defense of sovereign immunity, discussed at pages 42-49 of our brief in No. 72-1371.

This defense is not available against Bob Jones University because it did not seek affirmative action by the Commissioner but simply a prohibitory order against the withdrawal of its ruling. This distinction, while relevant for purposes of sovereign immunity (see *Knight v. State of New York*, 443 F. 2d 415, 420-421 (C.A. 2) and *Zapata v. Smith*, 437 F. 2d 1024 (C.A. 5)), does not, as Americans United suggests (Br. 41-42), minimize the conflict between the circuits in the two cases with respect to the substantive issue of the availability of injunctive relief.

Moreover, the University erroneously relies (Br. 30) upon the sovereign immunity cases as a basis for its suit on the ground that the Commissioner allegedly acted beyond the

Revenue Service's inability to take action with respect to these matters prevented its assessment and collection of taxes.<sup>24</sup>

scope of his authority and in an unconstitutional manner. But apart from the *Williams Packing* "under no circumstances" test, the concept of *ultra vires* action has no independent significance as an exception to the Anti-Injunction Act. Allegations of unconstitutionality do not establish an exception to the Anti-Injunction and Declaratory Judgment Acts. See pages 21-23 of our brief in No. 72-1371.

<sup>24</sup> The argument of *amicus* Council on Foundations (Br. 13-16) that the Anti-Injunction and Declaratory Judgment Acts prohibitions do not apply here because no assessments have yet been made, was properly rejected by both the Fourth Circuit and the District of Columbia Circuit (App. A135; R. 31). The University and Americans United have now abandoned the argument with good reason since the courts have long considered suits to enjoin preassessment administrative actions as in effect injunctions against assessment. See *Zamaroni v. Philpott*, 346 F. 2d 365 (C.A. 7) (suit to enjoin use of evidence in future action not yet in being); *Wahpeton Professional Services, P.C. v. Kniskern*, 275 F. Supp. 806 (D. N. Dak.) (suit to require issuance of professional corporation ruling); *National Council on the Facts of Overpopulation v. Caplin*, 224 F. Supp. 313 (D.D.C.) (suit to require issuance of tax exemption ruling); *Koin v. Coyle*, 402 F. 2d 468 (C.A. 7) (suit to enjoin use of certain evidence in making an assessment); *Brewster v. United States*, 423 F. 2d 1061 (C.A. 5) (suit to restrain audit, review, or discussion of plaintiff's taxes); *Balistreri v. United States*, 303 F. 2d 617 (C.A. 7) (suit to enjoin issuance of administrative summons of records); *Campbell v. Guetersloh*, 287 F. 2d 878 (C.A. 5) (suit to restrain use of "bank desposit" method to compute tax deficiency); *William B. Scaife & Sons Co. v. Driscoll*, 94 F. 2d 664 (C.A. 3), certiorari denied, 305 U.S. 603 (suit to enjoin Commissioner's refusal to allow filing of amended return); *West Chester Feed & Supply Co. v. Erwin*, 438 F. 2d 929 (C.A. 6) (suit to require Commissioner

b. The ultimate effect of such injunctive actions upon the assessment and collection of taxes cannot be minimized by simply recharacterizing these suits, as Americans United contends (Br. 23), as attempts by such an organization to relieve itself of the "burden of not being able to raise funds"<sup>25</sup> To begin with, the withdrawal of such a ruling is obviously not a flat prohibition against the raising of funds. Moreover, even acknowledging that the suspension of an organization's deductibility assurance ruling might make its task of raising of funds more difficult, the alternative would be an immediate reduction of the revenues through allowance of preliminary injunc-

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to reappraise property); *Ralston v. Heiner*, 21 F. 2d 494 (W.D. Pa.), affirmed, 24 F. 2d 416 (C.A. 3), certiorari denied, 277 U.S. 608 (suit to remove lien from property); *Calkins v. Smietanka*, 240 Fed. 138, 145-146 (N.D. Ill.) (suit to prevent production of records to Commissioner); *Gouge v. Hart*, 250 Fed. 802, 805 (W.D. Va.) (suit to nullify Government purchase of land at tax sale); *Tomlinson v. Poller*, 220 F. 2d 308 (C.A. 5), and *Czieslik v. Burnet*, 57 F. 2d 715 (E.D. N.Y.) (suit to prevent Commissioner's subjecting of property to tax lien); *Chester v. Ross*, 231 F. Supp. 23, 26 (N.D. Ga.), affirmed *per curiam* 351 F. 2d 949 (C.A. 5) (suit to restrain Commissioner's gathering of evidence to investigate plaintiff's taxes); *Miles v. Johnson*, 59 Fed. 38 (Cir. Ct. Ky.) (suit to restrain Commissioner from preventing withdrawal of whiskey which would exempt it from tax).

<sup>25</sup> Contrary to the view of the District of Columbia Circuit, we have argued at pages 23-24 of our brief in No. 72-1371, that such injunctive actions cannot be upheld on the basis of a simple assertion that the "primary design" of the complainant was not to restrain the assessment or collection of taxes.

tions in such cases. By enacting both the Anti-Injunction Act and adding the tax exception to the Declaratory Judgment Act, Congress has indicated that it did not intend the courts to interfere with the collection of revenues, whatever may be the impact of that principle upon the fund-raising ability of organizations claiming to be exempt from tax. Permitting such suits by alleged tax exempt organizations would have no less serious impact upon tax collection than permitting such suits by others.

It is accordingly not surprising that, except for the decision of the District of Columbia Circuit in No. 72-1371, every reported decision considering the question has held that the Anti-Injunction Act bars the courts from enjoining the Treasury from withdrawing tax-exemption or deductibility assurance rulings. *Crenshaw County Private School Foundation v. Connally*, 474 F. 2d 1185 (C.A. 5), petition for a writ of certiorari pending, No. 73-10; *Jolles Foundation, Inc. v. Moysey*, 250 F. 2d 166, 169 (C.A. 2); *Mitchell v. Riddell*, 402 F. 2d 842 (C.A. 9), appeal dismissed and certiorari denied, 394 U.S. 456; *National Council on the Facts of Overpopulation v. Caplin*, 224 F. Supp. 313 (D. D.C.); *Kyron Foundation, Inc. v. Dunlap*, 110 F. Supp. 428 (D. D.C.); *Israelite House of David v. Holden*, 14 F. 2d 701 (W.D. Mich.).

c. Bob Jones University does not rely upon the tripartite exception to the Anti-Injunction Act created by the District of Columbia Circuit in No. 72-1371.



Recognizing that the withdrawal of its ruling would have resulted in assessments and collections of additional taxes, it simply contends (Br. 28) that the prohibitions of the Anti-Injunction Act are not applicable because "this is not a tax case" but the use of "the onerous taxing power of the government to force recalcitrant parties in line with social concepts not in any way authorized by any act of Congress."<sup>26</sup> But as the Fourth Circuit noted (App. A137-A138), this Court had rejected such an argument more than 50 years ago in *Bailey v. George*, 259 U.S. 16. There, the Court refused to enjoin the collection of a child labor tax despite the contention that the tax was not for the purpose of raising revenue but for regulating child labor. Indeed, the Court rejected the taxpayer's claim for equitable relief notwithstanding its holding on the same day that the tax at issue was unconstitutional. *Child Labor Tax Case*, 259 U.S. 20.

Moreover, given the impossibility of determining whether a tax is regulatory<sup>27</sup> or revenue-producing, the conclusion reached in *Bailey v. George*, *supra*, is manifestly sound. As the Court subsequently observed in *Sonzinsky v. United States*, 300 U.S. 506,

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<sup>26</sup> Americans United (Br. 20) and *amicus* Council on Foundations (Br. 22-23) advance essentially the same contention. They urge that the Commissioner's policies with respect to tax-exempt organizations are more regulatory than revenue producing.

<sup>27</sup> It is noteworthy that Congress added the tax exception to the Declaratory Judgment Act in response to suits challenging the processing taxes, which could be classified as "regulatory". See *United States v. Butler*, 297 U.S. 1, 61.

513: "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect."

Thus, in numerous cases, the lower courts have upheld the statutory bars on injunctions against the Commissioner with respect to a variety of arguably regulatory taxes levied upon certain commodities or activities. See, e.g., *Singleton v. Mathis*, 284 F. 2d 616 (C.A. 8) (federal gambling tax); *Vasilinda v. United States*, C.A. 5, No. 71-1802, Slip Op. 3, fn. 2 (decided November 12, 1973) (marihuana taxes); *Lassoff v. Gray*, 266 F. 2d 745 (C.A. 6) (marihuana taxes); *Wells v. Campbell*, 113 F. Supp. 928 (N.D. Tex.) (marihuana taxes); *McAlister v. Cohen*, 436 F. 2d 422 (C.A. 4) (wagering taxes); *Gehman v. Smith*, 76 F. Supp. 805, 807-808 (E.D. Pa.) (tax on adulterated butter).

d. Finally, both Bob Jones (Br. 29-30) and Americans United (Br. 20-21) attempt to escape the application of the *Williams Packing* standard by relying upon earlier decisions of this Court such as *Hill v. Wallace*, 259 U.S. 44; *Lipke v. Lederer*, 259 U.S. 557; *Allen v. Regents*, 304 U.S. 439. Those cases involved applications of the "special and extraordinary facts and circumstances" test of *Miller v. Nut Margarine Co.*, 284 U.S. 498, 511. But the confusion over the interpretation of that standard was the precise reason given by this Court for hearing and deciding *Williams Packing* (see 370 U.S. at 2-3 and n. 1). The subsequently announced *Williams*

*Packing* rule was intended as a substitute and not as an additional test for determining the applicability of the Anti-Injunction Act.<sup>28</sup>

3. *The proposed revocation of Bob Jones University's tax ruling because of its racially discriminatory admissions policy is not a case in which it is clear that under no circumstances could the government prevail on the merits of its claim.*

Section 501(c)(3) of the Code, Appendix, *infra*, pp. 43-44, provides a tax exemption for organizations

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<sup>28</sup> In *Hill v. Wallace*, members of the Chicago Board of Trade had brought a type of shareholder derivative suit against the Board in order to test the constitutionality of a tax upon grain future transactions. Because the Commissioner of Internal Revenue was not served, he was dismissed as a defendant (259 U.S. at 72). Since the Court was likely to render an opinion as to the constitutionality of the statute, the Solicitor General appears to have waived the benefit of the Anti-Injunction Act and argued the substantive issue of the constitutionality of the statute (see 257 U.S. 310, 615). See also *Helvering v. Davis*, 301 U.S. 619. Similarly, *Lipke v. Lederer*, 259 U.S. 557, is not in point, as it involved penalties in the nature of punishment for a criminal offense, the violation of the National Prohibition Act. As the Court later stated in *Graham v. duPont*, 262 U.S. 234, 257, *Lipke* was "not [a case] of enjoining taxes at all."

Moreover, *Allen v. Regents*, 304 U.S. 439, does not, as *Americans United* suggests (Br. 21-23), support the proposition that the Anti-Injunction Act does not bar a suit by non-taxpayers regarding their statutory duties to collect and remit taxes owed by others. The lower courts have held to the contrary with respect to certain excise taxes and withholding taxes. *Jules Hairstylists of Maryland v. United States*, 268 F. Supp. 511 (D. Md.), affirmed *per curiam*, 389 F. 2d 389 (C.A. 4), certiorari denied, 391 U.S. 934; *Reamis v. Vroorman-Fehn Printing Co.*, 140 F. 2d 237 (C.A. 6). See also *Eighth Street Baptist Church v. United States*, 431 F. 2d 1193 (C.A. 10).

"organized and operated exclusively for religious, charitable \* \* \* or educational purposes." Section 170(a) and (c)(2), Appendix, *infra*, permit a deduction for any "charitable contribution" made to such organizations. These statutes were respectively enacted in 1913 and 1917 in order to maintain public support of charities in the face of increased taxation. They are in *pari materia* and are designed to encourage organizations to perform beneficial functions which the government would otherwise have to conduct. See H. Rep. No. 1860, 75th Cong., 3d Sess., p. 19; 50 Cong. Rec. 1259; 55 Cong. Rec. 6728-6729, 6741; Weil, *Tax Exemptions for Racial Discrimination in Education*, 23 Tax L. Rev. 399, 401-402.

Since the Section 170(a) deduction is allowed for a "charitable contribution," it has been held that the recipient organization must qualify as "charitable," even if it performs "religious" or "educational" functions. *Green v. Connally*, *supra*, 330 F. Supp. at 1157-1160. See also Rev. Rul. 67-325, 1967-2 Cum. Bull. 113, 116 and authorities cited therein; Reiling, *Federal Taxation: What is a Charitable Organization?*, 44 A.B.A.J. 525, 527; Note, *Federal Tax Benefits to Segregated Private Schools*, 68 Col. L. Rev. 922, 941-942. This reading of the statutory provisions is supported by the Court's statement in *Helvering v. Bliss*, 293 U.S. 144, 147, that the deduction provision was enacted "in order to encourage gifts to religious, educational and other charitable objects \* \* \*." (Emphasis supplied.)

At common law, a charitable trust could not be created for a purpose which is illegal or whose accomplishment would tend to frustrate some well-settled public policy. *Ould v. Washington Hospital for Foundlings*, 95 U.S. 303, 311; Restatement of Trusts 2d, § 377, comment c. In light of this Court's historic decision in *Brown v. Board of Education*, 347 U.S. 483, and its progeny, it is beyond question that there is now a broad national policy against segregation in public education and public facilities as well as governmental assistance to private segregated facilities. Not only has this policy against segregated education been manifested in numerous decisions of this Court, but it has also found expression in Acts of Congress. Notably, Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, forbids discrimination on the grounds of race, color, or national origin in "any program or activity receiving Federal financial assistance." Thus, the national policy against segregated public education has been extended to forbid governmental aid to any program, public or private, which excludes or denies benefits to persons on the basis of race.<sup>29</sup>

Most recently, in *Norwood v. Harrison*, No. 72-77, October Term, 1972 (decided June 25, 1973), the Court struck down a Mississippi free textbook loan

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<sup>29</sup> See also, *Evans v. Abney*, 396 U.S. 435; *Commonwealth of Pennsylvania v. Brown*, 392 F. 2d 120 (C.A. 3), certiorari denied, 391 U.S. 921; *Wachovia Bank and Trust Co., N.A. v. Buchanan*, 346 F. Supp. 665 (D. D.C.); *Connecticut Bank & Tr. Co. v. Johnson Memorial Hospital*, 30 Conn. Supp. 1, 294 A.2d 586 (Conn. Super. Ct.).

program because it provided aid to both public schools and private racially segregated schools. In so holding, the Court observed (Slip Op. 10) that "[a] State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination."

Similarly, the recognition by the Internal Revenue Service of Bob Jones University's tax-exempt status and the right to receive tax-deductible contributions serves to "facilitate, reinforce, and support" its racially discriminatory admissions policy within the meaning of *Norwood*. Indeed, the importance of this tax treatment to the University's program is amply demonstrated by its effort to restrain the Commissioner in this case. Maintenance of this tax benefit cannot be allowed because it would, as this Court stated in an analogous context, "frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30, 33-34.

In light of these authorities, the conclusion of the three-judge court in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), affirmed *sub nom. Coit v. Green*, 404 U.S. 997, that private schools practicing racial discrimination are not entitled to tax exemption or deductible contributions, appears to be inescapable. As a result, the potential withdrawal of the University's tax ruling under the announced policy of the Internal Revenue Service which is squarely in accord with the *Green* decision is manifestly sound. But under

the *Williams Packing* test, it is not necessary to demonstrate the correctness of this position on the merits. Rather, the University's claim for injunctive relief can only succeed if it can show that under no circumstances could the government ultimately prevail on the merits of its claim.

Given the extensive analysis of the question in the *Green* decision, it can hardly be said that "under no circumstances" could the government prevail in establishing that the University's conduct rendered it ineligible for the federal tax benefits in question. On this basis, the Fourth Circuit correctly rejected the University's claim for injunctive relief against the Commissioner.

**B. Both Americans United and Bob Jones University have adequate legal means to litigate their eligibility for exempt status and tax deductible contributions.**

In our brief in No. 72-1371 (pp. 34-37), we have pointed out that Americans United had at least two fully adequate legal means to challenge the Commissioner's revocation of its ruling. First, it could have filed a claim for refund of F.U.T.A. taxes which were due once its exemption was withdrawn.<sup>30</sup> Secondly, it could have arranged for a contributor to

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<sup>30</sup> Contrary to the contention of Americans United (Br. 35), a charitable trust is also exempt from F.U.T.A. taxes and would therefore also be able to test its exempt status in a F.U.T.A. tax refund suit. Regardless of the application of Section 642(c), such trusts have long been held to be exempt under Section 501(c)(3). See, e.g., *Fifty-Third Union Trust Co. v. Commissioner*, 56 F. 2d 767 (C.A. 6); Rev. Proc. 73-29 1973-40 I.R.B. 18.

test his right to a charitable deduction in a Tax Court proceeding or refund suit.

These two remedies would have been available to Bob Jones University as well. In addition, it appears that the University had a third legal remedy at its disposal. Given its accountant's sworn statement (App. A43-A44) that the University itself would have owed substantial amounts of income if its ruling had been withdrawn, it could have litigated its right to exempt status either in the Tax Court or in a refund suit.<sup>31</sup>

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<sup>31</sup> This latter remedy was not available to Americans United because its lobbying activities did not terminate its exemption from income taxes. Rather, the Commissioner's action with respect to Americans United was to reclassify it as a Section 501(c)(4) organization which, while exempt from income taxes, is ineligible to receive tax deductible contributions. On the University's petition for rehearing, the Fourth Circuit (App. A150-A151) erroneously distinguished the Commissioner's action in the *Americans United* case on the ground that it did not affect the organization's tax liability at all. However, as a Section 501(c)(4) organization, Americans United did become liable for F.U.T.A. taxes. In any event, we submit that the effect of the injunction against assessment of donors is barred by the Anti-Injunction Act.

Americans United (Br. 34) and *amicus* Council on Foundations (Br. 11) argue that the refund suit is inadequate because the Internal Revenue Service might not issue the contested ruling even if the taxpayer prevailed on the merits in the refund suit. In support of this contention, they cite Paragraph 270 of the IRS Exempt Organization Handbook, which requires that an organization prevailing in a court test of its exempt status must file an exemption application and establish its right to exemption before the Internal Revenue Service will recognize its exempt status for years subsequent to those involved in the court's decision. As the agency charged with



Neither the University, Americans United, nor the *amici* question the existence and availability of these legal remedies. They urge, however, that the loss of contributions attendant upon the withdrawal of a tax ruling is an irreparable injury for which the legal remedies are inadequate.<sup>32</sup> But even assuming that the loss of contributions would constitute an irreparable injury, this Court in *Williams Packing* held that that claim alone is insufficient to support a suit for injunctive relief against the assessment or collection of taxes. In appraising the scope of the Anti-Injunction Act, the Court emphasized that Congress did not make the availability of the injunctive remedy depend upon the lack of an efficient legal remedy as it did with respect to injunctions against state taxes. Cf. 28 U.S.C. 1341. Thus, the Court observed, "[i]ts failure to do so shows that such a suit [against federal tax collections] may not be entertained merely because collection would cause an

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the administration of the tax statutes, it is necessary for the Internal Revenue Service to receive an application from such an organization in order to determine that the facts and law upon which the judgment of the court was based remains the same. We are advised by the Internal Revenue Service that while this requirement is absolutely necessary from an administrative standpoint, its normal practice is to issue a favorable ruling upon the application of an organization which has prevailed in a court suit.

<sup>32</sup> Moreover, it is the policy of the Internal Revenue Service to assist in preserving the recurring legal issues presented in such cases for presentation to the courts. *Mitchell v. Riddell*, 402 F. 2d 842 (C.A. 9), relied upon by Americans United (Br.

irreparable injury, such as the ruination of the taxpayer's enterprise (370 U.S. at 6).<sup>33</sup>

Thus, in urging that the loss of contributions caused by the Commissioner's withdrawal of an exempt organization's ruling is an injury which warrants equitable relief, both the University and Amer-

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28), is not to the contrary. There, the taxpayer did not even fill out a tax return and a tax was never assessed. Instead, he merely sent \$10 to the Internal Revenue Service with a statement that no tax was due for any year, and then demanded a refund on the ground that a trust was tax exempt. See Brief for the District Director, *Mitchell v. Riddell* (C.A. 9), No. 22406, pp. 3-6.

Finally, *Americans United* (Br. 32) points to the government's ability to moot out a refund suit as a limitation upon the adequacy of such a remedy, citing *Church of Scientology of Hawaii v. United States*, 485 F. 2d 313 (C.A. 9). But that case did not involve an attempt to avoid a legal test. The issue there was whether the organization's income in 1965 and 1966 inured to the benefit of private individuals in violation of the requirement of Section 501(c)(3). That issue was entirely factual and involved a development of the facts for each individual year. Neither the government's attempt to moot the suit, nor a judicial decision on the merits, would control the organization's right to a deductibility assurance or tax exemption ruling for any other years.

<sup>33</sup> Challenging the correctness of this statement of the Court in *Williams Packing*, *Americans United* (Br. 18, n. 9) attempts to import the exception in 28 U.S.C. 1341 for cases in which there is no "plain, speedy and efficient remedy" into the Anti-Injunction Act involved here. Its argument rests entirely upon statements in the legislative history of 28 U.S.C. 1341 that Congress had previously enacted "similar" measures. While the two statutes may be similar, the differences in their terms amply justify this Court's conclusion that their standards are not identical.

icans United seek a modification of the *Williams Packing* standard. This type of injury, however, is an inevitable consequence of the fact that disputes between taxpayers and the Internal Revenue Service are not instantly resolved through litigation.<sup>34</sup> While this process may be time consuming, the alternative sought by the University and Americans United—the right to a preliminary injunction—would render all contributions deductible throughout the litigation.

Given the broad policy underlying the Anti-Injunction Act,<sup>35</sup> it seems highly unlikely that Congress intended to allow organizations automatically to retain their exemptions and the right to receive deductible contributions during the pendency of the litigation in which their status is determined, in derogation of

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<sup>34</sup> Americans United complains (Br. 33-34) that the legal remedy is inadequate because the unsuccessful party at trial can always appeal. But this is the case with respect to every type of tax litigation under the system of judicial review established by Congress.

<sup>35</sup> Nothing in 28 U.S.C. 1340, relied upon by Americans United (Br. 25), casts doubt upon the broad reach of the Anti-Injunction Act. The former provision gives the district courts subject matter jurisdiction over "any civil action arising under any Act of Congress providing for internal revenue." If this provision were construed as an independent grant of equity powers to the district courts in all federal tax cases, the force of the Anti-Injunction Act would effectively be eliminated. Surely, therefore, the two provisions must be harmoniously construed together so as to permit the district courts only to issue money judgments against the United States in tax cases.

the revenue,<sup>36</sup> regardless of the merits of their claims or the outcome of the litigation. We therefore submit that, other than those cases which meet the two-fold test of *Williams Packing*, no exception can be made from the strict prohibition on injunctions against the assessment or collection of taxes.

When viewed against the background of the entire advance rulings program administered by the Internal Revenue Service, there is little justification for allowing an exception from the *Williams Packing* rule for litigation involving eligibility for exempt status and receipt of deductible contributions. The deeply rooted Congressional policy against injunctions is equally applicable to all federal tax controversies.

Just as the University and Americans United may suffer by not being able to enjoy the benefits of tax deductible contributions while litigating their right to such treatment, many businesses and individuals delay entering into advantageous transactions in order to await the issuance of an Internal Revenue Service ruling with respect to its tax consequences. In many instances, the Internal Revenue Service will ultimately decline to issue the requested ruling or will issue an unfavorable decision. The parties may thereupon decide not to pursue the pro-

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<sup>36</sup> Americans United (Br. 13) and *amicus* Council on Foundations (Br. 16) argue that there would be no revenue losses because prospective donors would simply redirect their contributions to other exempt organizations. Suffice it to say that there is no factual support for this speculative assertion.

posed transaction, often at great financial loss. In such cases, judicial resolution of the tax consequences can only be obtained after the transaction is executed.<sup>37</sup> If, however, taxpayers or affected nontaxpayers could, in advance of a transaction, force the Commissioner to rule favorably or, for that matter, to rule upon a question as to which he has declined to issue a decision, the courts would be inundated with requests for injunctions<sup>38</sup> covering the entire gamut of issues where tax rulings are usually

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<sup>37</sup> For example, in *Commissioner v. Gordon*, 391 U.S. 83, this Court considered the tax consequences to the shareholders of a corporate transaction with respect to which the Internal Revenue Service had declined to issue a favorable ruling.

<sup>38</sup> Such judicial intrusions into the rulings program have already occurred. At the urging of an unincorporated association representing participants in a tax shelter cattle feed program which cited the District of Columbia Circuit's *Americans United* decision, a district court has recently issued an injunction forbidding the Internal Revenue Service to disallow deductions for end-of-year payments for feed as a distortion of income. *Cattle Feeders Tax Committee v. Shultz*, Civil No. 73-794-C (W.D. Okla.) (decided December 6, 1973). On November 6, 1973, the Internal Revenue Service had announced its intention to disallow these deductions if they materially distort income. See T.I.R. 1261, 1973 CCH Stand. Fed. Tax Rep., par. 6951.

In addition, another district court has ordered the Internal Revenue Service to revoke the exempt status of several hospitals on the alleged ground that they do not admit indigent patients. *Eastern Kentucky Welfare Rights Organization v. Shultz*, Civil No. 1378-71 (D.D.C.) (decided December 20, 1973).

sought.<sup>39</sup> Under such circumstances, the discretion necessary to administer the rulings program effectively would be seriously impaired.

In sum, the issuance of injunctions in cases involving eligibility for exempt status is no different in substance from controversies arising under any other provision of the Internal Revenue Code. The subjection of the wide variety of administrative actions of the Internal Revenue Service to judicial review and equitable remedies would severely disrupt the orderly collection of the nation's revenues. Both Congress and this Court have recognized the paramount importance of the revenue collection process and have therefore protected the Treasury from injunctive actions to which most other Executive departments and administrative agencies are subject. The rationale of the District of Columbia Circuit's modification to the strict protection afforded by the *Williams Packing* standard cannot be logically

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<sup>39</sup> Common examples of requests for rulings by nontaxpayers include applications by governmental units as to whether interest on their bonds is exempt under Code Section 103; applications by corporations as to the tax effect of certain reorganization transactions on their shareholders; applications by employers as to the tax effect of pension plans upon their employees; applications by regulated investment companies (see Code Sections 851-855) regarding the tax effect of transactions on their shareholders; applications by cooperative housing corporations regarding the tax effects of their transactions on their tenant stockholders (see Code Section 216); applications by trade associations respecting the tax effect of transactions on their members; and applications by banks regarding the includability of accrued interest in the income of their depositors.

limited to questions involving tax-exempt status rulings. Modification of this strict protection in any respect would have a far reaching effect upon the collection of revenues and the administration of the entire tax ruling program. If changes of such a fundamental character are to be forthcoming with respect to the rule of *Williams Packing*, we submit that they should be made by Congress and not by the courts.

#### CONCLUSION

For the reasons stated, the judgment of the court of appeals in No. 72-1470 should be affirmed and the judgment of the court of appeals in No. 72-1371 should be reversed and the cause remanded to the district court with instructions to dismiss the complaint.

Respectfully submitted.

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## APPENDIX A

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS  
AND GIFTS.

\* \* \* \*

(c) [as amended by Sec. 201(a), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] *Charitable Contribution Defined*.—For purposes of this section, the term “charitable contribution” means a contribution or gift to or for the use of—

\* \* \* \*

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (includ-



ing the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

\* \* \* \*

#### SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

\* \* \* \*

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

\* \* \* \*

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political

campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

\* \* \* \*

SEC. 3301 [as amended by Sec. 301(a), Employment Security Amendments of 1970, P.L. 91-373, 84 Stat. 695]. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306 (a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306 (b)) paid by him during the calendar year with respect to employment (as defined in section 3306 (c)).

SEC. 3306. DEFINITIONS.

\* \* \* \*

(c) [as amended by Sec. 105(a), Social Security Amendments of 1970, *supra*] *Employment*.—For purposes of this chapter, the term “employment” means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Inter-

nal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, \* \* \* except—

\* \* \* \*

(8) [as amended by Sec. 533, Social Security Amendments of 1960, P.L. 86-778, 74 Stat. 924] service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

**SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.**

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] *Tax*.—Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such

person is the person against whom such tax was assessed.

\* \* \* \*

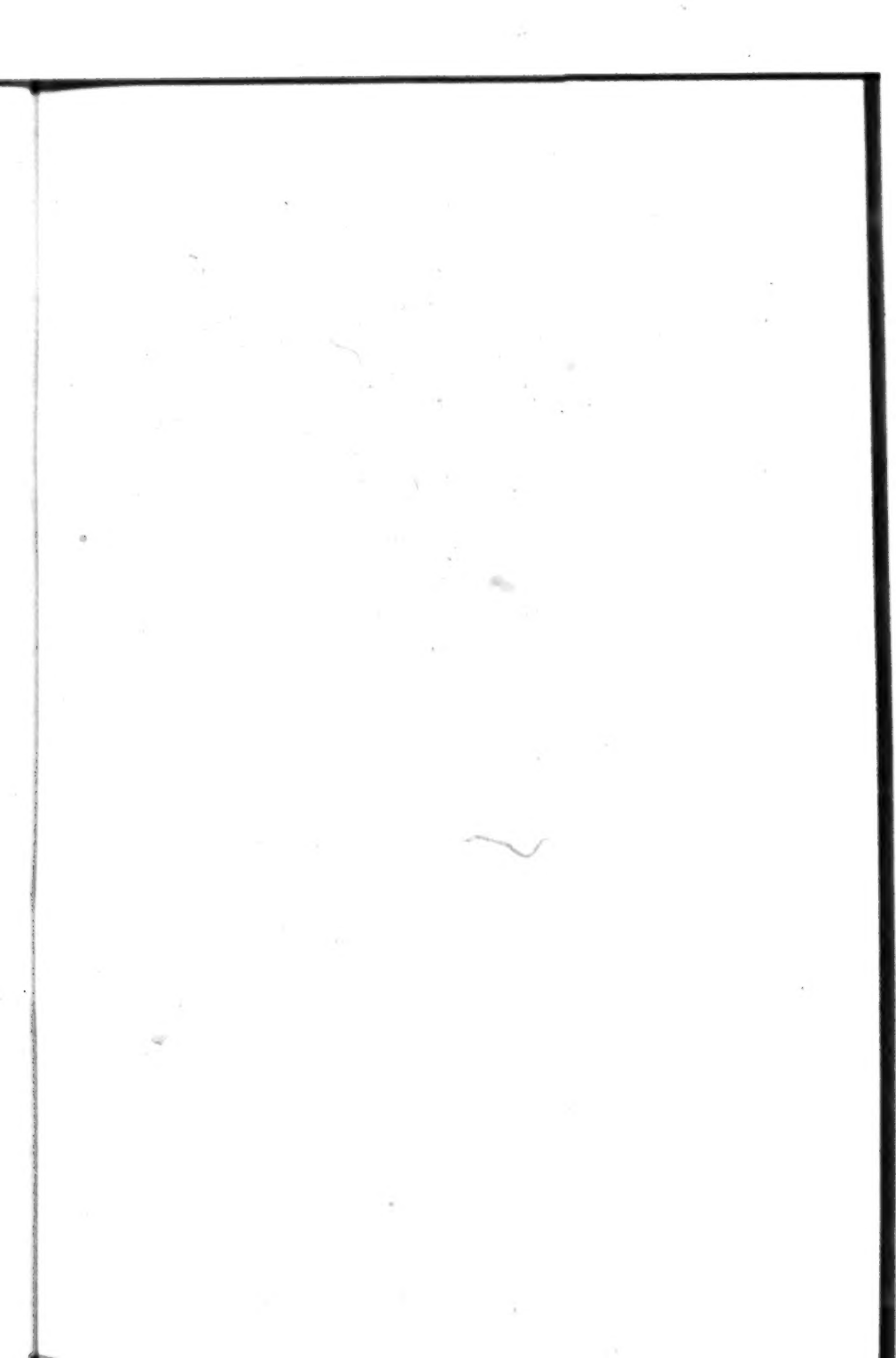
## 28 U.S.C.:

§ 2201 [as amended by Sec. 111, Act of May 24, 1949, c. 139, 63 Stat. 89]. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. *Further relief.*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.



ALEXANDER, COMMISSIONER OF INTERNAL  
REVENUE v. "AMERICANS UNITED" INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1371. Argued January 7, 1974—Decided May 15, 1974

Respondent, a nonprofit corporation, had a ruling letter assuring it of tax-exempt status under § 501 (c) (3) of the Internal Revenue Code of 1954 (Code). The Internal Revenue Service (IRS) revoked the ruling letter on the ground that respondent had violated the lobbying proscriptions of §§ 501 (c) (3) and 170 of the Code, the effect of which was to render it liable for federal unemployment taxes and to terminate its eligibility for tax-deductible contributions. Respondent and two of its benefactors brought this action seeking a declaratory judgment that the IRS' administration of the lobbying provisions of §§ 501 (c) (3) and 170 was erroneous or unconstitutional and injunctive relief requiring reinstatement of its § 501 (c) (3) tax-exempt status. The District Court dismissed the complaint on the ground, *inter alia*, that the action was barred by the prohibition in § 7421 (a) of the Code against suits "for the purpose of restraining the assessment or collection of any tax." The Court of Appeals agreed that the action could not be maintained by the benefactors but held that respondent's suit was not barred on the grounds that respondent raised constitutional allegations; that the primary design of the suit was not to enjoin the assessment or collection of respondent's own taxes; that restraining the assessment or collection of the taxes of respondent's contributors was only a "collateral effect" of this suit; and that in the absence of injunctive relief respondent would sustain irreparable injury for which there was no adequate legal remedy. The court consequently affirmed the dismissal as to the benefactors but reversed as to respondent. *Held*: The action is barred by § 7421 (a). *Enochs v. Williams Packing & Navigation Co.*, 370 U. S. 1; *Bob Jones University v. Simon*, *ante*, p. 725. Pp. 758-763.

(a) The constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under § 7421 (a). Pp. 759-760.

(b) That respondent was not seeking to enjoin the assessment or collection of its own taxes is irrelevant, for § 7421 (a) bars a suit to enjoin the assessment or collection of anyone's taxes. P. 760.

(c) Under any reasonable construction of the statutory term "purpose," the objective of this action was to restrain the assessment and collection of taxes from respondent's contributors, the purpose being to restore advance assurance that donations to respondent would qualify as charitable deductions for respondent's donors. Pp. 760-761.

(d) An action for refund of unemployment taxes, even if successful, will not lead to the recovery of contributions lost in the interim between withdrawal of a § 501 (c) (3) ruling letter and the final adjudication of entitlement to § 501 (c) (3) status. This is, however, merely a form of irreparable injury, which in itself is insufficient to avoid the bar of § 7421 (a). Pp. 761-762.

(e) An action for refund of unemployment taxes will afford respondent a full opportunity to litigate the legality of the IRS' withdrawal of its § 501 (c) (3) ruling letter, since respondent's liability for such taxes hinges on precisely the same legal issue as does its eligibility for tax-deductible contributions under § 170, i. e., its entitlement to § 501 (c) (3) status. P. 762.

155 U. S. App. D. C. 284, 477 F. 2d 1169, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post*, p. 763. DOUGLAS, J., took no part in the decision of the case.

*Assistant Attorney General Crampton* argued the cause for petitioner. With him on the briefs were *Solicitor General Bork*, *Richard B. Stone*, *Stuart A. Smith*, *Ernest J. Brown*, *Grant W. Wiprud*, and *Leonard J. Henzke, Jr.*

*Alan B. Morrison* and *Franklin C. Salisbury* argued the cause and filed a brief for respondent.\*

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\*Briefs of *amici curiae* urging affirmance were filed by *H. David Rosenbloom*, *Harry J. Rubin*, *John Holt Myers*, *Samuel Rabinove*, and *Mortimer M. Caplin* for the Council on Foundations, Inc., and by *Thomas F. Field* for Tax Analysts and Advocates.

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondent is a nonprofit, educational corporation organized under the laws of the District of Columbia as "Protestants and Other Americans United for Separation of Church and State." Its purpose is to defend and maintain religious liberty in the United States by the dissemination of knowledge concerning the constitutional principle of the separation of church and State. In 1950, the Internal Revenue Service issued a ruling letter that respondent qualified as a tax-exempt organization under the predecessor provision to § 501 (c) (3) of the Internal Revenue Code of 1954 (the Code), 26 U. S. C. § 501 (c) (3).<sup>1</sup> As a result, the Service treated contributions to respondent as charitable deductions under the predecessor provision of § 170 (c) (2) of the Code, 26 U. S. C. § 170 (c) (2).<sup>2</sup> This situation continued unchanged until

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<sup>1</sup> The predecessor provision of Code § 501 (c) (3) was § 101 (6) of the Internal Revenue Code of 1939. Section 501 (c) (3) describes the following as organizations exempt from federal income taxes by virtue of § 501 (a):

"Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

<sup>2</sup> The predecessor provision of § 170 (c) (2) of the Code was § 23 (o) (2) of the Internal Revenue Code of 1939. Section 170 (c) (2) defines a "charitable contribution" for purposes of § 170 (a), the charitable deduction provision, to mean a contribution or gift to or for the use of:

"A corporation, trust, or community chest, fund, or foundation—



April 25, 1969, when the Service issued a ruling letter revoking the 1950 ruling on the ground that respondent had violated §§ 501 (c)(3) and 170 (c)(2)(D) by devoting a substantial part of its activities to attempts to influence legislation. Shortly thereafter, the Service issued another ruling letter exempting respondent from income taxation as a "social welfare" organization under Code § 501 (c)(4), 26 U. S. C. § 501 (c)(4).<sup>3</sup> The effect of this change in status was to render respondent liable for unemployment (FUTA) taxes under Code § 3301, 26 U. S. C. § 3301,<sup>4</sup> and to destroy its eligibility for tax-deductible contributions under § 170.

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"(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

"(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

"(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

"(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

The differences between the requirements of §§ 501 (c)(3) and 170 (c)(2) are minor and are not involved in this litigation.

<sup>3</sup> Section 501 (c)(4) lists the following organizations as qualifying under the § 501 (a) exemption from federal income taxes:

"Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

<sup>4</sup> See Code § 3306 (c)(8), 26 U. S. C. § 3306 (c)(8). Respondent began paying FUTA taxes in February 1970 and has stated its willingness to continue to do so in light of its relatively insubstantial

Because the 1969 ruling letter caused a substantial decrease in its contributions, respondent and two of its benefactors initiated the instant action in the United States District Court for the District of Columbia on July 30, 1972.<sup>5</sup> They sought a declaratory judgment that the Service's administration of the lobbying proscriptions of §§ 501 (c) (3) and 170 was erroneous or unconstitutional<sup>6</sup> and injunctive relief requiring rein-

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liability for such taxes. The Service reports that respondent paid \$981.13 in FUTA taxes for the year 1969, \$1,052.60 for 1970, \$889.09 for 1971, and \$1,131.36 for 1972. Brief for Petitioner 4 n. 2.

Ordinarily, respondent's shift from § 501 (c) (3) status to § 501 (c) (4) status would also have meant that it would become subject to federal social security (FICA) taxes; since § 501 (c) (3) organizations are exempt from such taxes but § 501 (c) (4) organizations are not. Code § 3121 (b) (8) (B), 26 U. S. C. § 3121 (b) (8) (B). This distinction is not involved here, however, because respondent in prior years voluntarily elected to pay FICA taxes although it held § 501 (c) (3) status. This election had been in effect for more than eight years, which rendered respondent incapable of terminating its election to pay FICA taxes even if it had retained its § 501 (c) (3) status. Code § 3121 (k) (1) (D), 26 U. S. C. § 3121 (k) (1) (D).

<sup>5</sup> Federal jurisdiction was founded on 28 U. S. C. §§ 1331 and 1340 and on § 10 of the Administrative Procedure Act, now 5 U. S. C. §§ 701-706.

<sup>6</sup> The amended complaint identified five claims: (1) that the lobbying proscriptions of §§ 501 (c) (3) and 170 (c) (2) (D) and the Service's administration of them were unconstitutional due to the restrictions imposed on the exercise of First Amendment rights of political advocacy by respondent and its contributors; (2) that the "substantial part" test of these provisions denied equal protection of the laws in conflict with the Due Process Clause of the Fifth Amendment, by allowing large tax-exempt organizations to engage in a greater quantum of lobbying activity than is allowed to smaller organizations; (3) that this disparity in the absolute amounts of lobbying activity allowed large and small § 501 (c) (3) organizations, enabled certain large churches to engage in more lobbying in favor of government aid to church schools than respondent could bring to

statement of respondent's § 501 (c)(3) ruling letter. Because their objections to the Service's action included a facial challenge to the constitutionality of federal statutes,<sup>7</sup> they also requested the convening of a three-judge district court pursuant to 28 U. S. C. § 2282.

The Service moved to dismiss the action, principally on the ground that the exception in the Declaratory Judgment Act for cases "with respect to Federal taxes,"<sup>8</sup> and the prohibition in the Anti-Injunction Act against suits "for the purpose of restraining the assessment or collection of any tax,"<sup>9</sup> ousted the court of subject-

bear in opposition, thereby violating the plaintiffs' rights under the Establishment and Free Exercise Clauses of the First Amendment; (4) that the statutory standards of "substantial part" and "propaganda" were so lacking in specificity that they constituted an invalid delegation of legislative power to the Service; and (5) that the Service acted arbitrarily and capriciously in revoking respondent's § 501 (c)(3) exemption. The last two contentions apparently were not advanced in the Court of Appeals. There the argument centered on the "discriminatory" aspects of the "substantial part" test identified above as claim (2).

<sup>7</sup> Specifically, respondent and its coplaintiffs sought to have the exemption clauses of § 501 (c)(3) severed from the remainder of that section and declared unconstitutional.

<sup>8</sup> The federal tax exception to the Declaratory Judgment Act appears in 28 U. S. C. § 2201:

"In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." (Emphasis added.)

<sup>9</sup> The Anti-Injunction Act (Income Tax Assessment) is set forth in Code § 7421 (a), 26 U. S. C. § 7421 (a):

"Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court

matter jurisdiction. The District Court accepted this argument, refused to convene a three-judge court, and dismissed the complaint in an unpublished order filed March 9, 1971. The United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal insofar as it pertained to the individual plaintiffs, but it reversed as to respondent and remanded the case to the District Court with instructions to convene a three-judge court. *"Americans United" Inc. v. Walters*, 155 U. S. App. D. C. 284, 477 F. 2d 1169 (1973). The Service petitioned for review, and we granted certiorari. 412 U. S. 927 (1973). We reverse.

In our opinion in *Bob Jones University v. Simon*, ante, p. 725, we examined the meaning of the Anti-Injunction Act and its interpretation in prior opinions of this Court, and we reaffirmed our adherence to the two-part test announced in *Enochs v. Williams Packing & Navigation Co.*, 370 U. S. 1 (1962). To reiterate, the Court in *Williams Packing* unanimously held that a pre-enforcement injunction against the assessment or collection of taxes may be granted only (i) "if it is clear that under no circumstances could the Government ultimately prevail . . .," *id.*, at 7 and (ii) "if equity jurisdiction otherwise exists." *Ibid.* Unless both conditions are met, a suit for preventive injunctive relief must be dismissed.

In the instant case the Court of Appeals recognized *Williams Packing* as controlling precedent for respondent's individual coplaintiffs and affirmed the dismissal of the suit as to them. 155 U. S. App. D. C., at 292, 477 F. 2d, at 1177. The court held that the relief requested by the individual plaintiffs "relate[d] directly to the assessment and collection of taxes" and that the allegations of

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by any person, whether or not such person is the person against whom such tax was assessed."

None of the exceptions is relevant to this case.

infringements of constitutional rights were "to no avail" in overcoming the barrier of § 7421 (a). *Id.*, at 291, 477 F. 2d, at 1176. The court also recognized that respondent could not satisfy the *Williams Packing* criteria, *id.*, at 298, 477 F. 2d, at 1183, but concluded that respondent's suit was without the scope of the Anti-Injunction Act and therefore not subject to the *Williams Packing* test.<sup>10</sup>

The court's conclusion with regard to respondent rested on the confluence of several factors. One was the constitutional nature of respondent's claims. As the court noted, the thrust of respondent's argument is not that it qualifies for a § 501 (c)(3) exemption under existing law but rather that that provision's "substantial part" test and proscription against efforts to influence legislation are unconstitutional. *Id.*, at 293, 477 F. 2d, at 1178. Obviously, this observation could not have been dispositive to the Court of Appeals, for this factor does not differentiate respondent, which was allowed to sue, from the individual coplaintiffs, who likewise pressed constitutional claims but who were dismissed from the action. Furthermore, decisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under the Anti-Injunction Act. *E. g.*,

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<sup>10</sup> The Court of Appeals also held that the scope of the "except with respect to Federal taxes" clause of the Declaratory Judgment Act, see n. 8, *supra*, is coterminous with the Anti-Injunction Act ban against suits "for the purpose of restraining the assessment or collection of any tax" despite the broader phrasing of the former provision. 155 U. S. App. D. C. 284, 291, 477 F. 2d 1169, 1176. While we take no position on this issue, it is in any event clear that the federal tax exception to the Declaratory Judgment Act is at least as broad as the prohibition of the Anti-Injunction Act. Because we hold that the latter Act bars the instant suit, there is no occasion to deal separately with the former. See *Bob Jones University v. Simon*, *ante*, at 732-733, n. 7.

*Bailey v. George*, 259 U. S. 16 (1922); *Dodge v. Osborn*, 240 U. S. 118 (1916).

The other three factors identified by the Court of Appeals are equally unpersuasive. First, the court noted that respondent "does not seek in this lawsuit to enjoin the assessment or collection of its own taxes." 155 U. S. App. D. C., at 292, 477 F. 2d, at 1177. Because respondent volunteered to pay FUTA taxes even if it obtained an injunction restoring its § 501 (c)(3) status, this observation, we may assume, is correct. It is also irrelevant. Section 7421 (a) does not bar merely a taxpayer's attempt to enjoin the collection of its own taxes. Rather, it declares in sweeping terms that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."<sup>11</sup> Thus a suit to enjoin the assessment or collection of anyone's taxes triggers the literal terms of § 7421 (a).

Perhaps the real point of the court's observation about respondent's taxes was to set the stage for its more pertinent conclusion that restraining the assessment or collection of taxes was "at best a collateral effect" of respondent's action and that this suit arose "in a posture removed from a restraint on assessment or collection." 155 U. S. App. D. C., at 294, 477 F. 2d, at 1179. We disagree. Under any reasonable construction of the statutory term "purpose," the objective of this suit was to restrain the assessment and collection of taxes from respondent's contributors. The obvious

<sup>11</sup> The portion of § 7421 (a) beginning with "by any person" was added to the Act in 1966. See *Bob Jones University v. Simon*, ante, at 731-732, n. 6. As we noted there, however, the "by any person" phrase reaffirms the plain meaning of the original language of the Act.

purpose of respondent's action was to restore advance assurance that donations to it would qualify as charitable deductions under § 170 that would reduce the level of taxes of its donors.<sup>12</sup> Indeed, respondent would not be interested in obtaining the declaratory and injunctive relief requested if that relief did not effectively restrain the taxation of its contributors. Thus we think it circular to conclude, as did the Court of Appeals, that respondent's "primary design" was not "to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation." *Ibid.* The latter goal is merely a restatement of the former and can be accomplished only by restraining the assessment and collection of a tax in contravention of § 7421 (a).

Finally, the Court of Appeals emphasized that respondent had no "alternate legal remedy in the form of adequate refund litigation . . ." *Id.*, at 295, 477 F. 2d, at 1180. The court recognized, of course, that respondent does have an opportunity to litigate its claims in an action for refund of FUTA taxes but dismissed this alternative with the statement that "it is subject to certain conditions and, we feel, is so far removed from the mainstream of the action and relief sought as to hardly be considered adequate." *Id.*, at 294 n. 13, 477 F. 2d, at 1179 n. 13. The import of these comments is unclear. If they are taken to mean that a refund action is, as a practical matter, inadequate to avoid the decrease in respondent's contributions for the interim between the withdrawal of § 501 (c) (3) status and the final adjudication of its en-

<sup>12</sup> Alternatively, this suit was intended to reassure private foundations that they could make contributions to respondent without risk of tax liability under Code § 4945 (d) (5), 26 U. S. C. § 4945 (d) (5). In this respect, the purpose of this action was to restrain the assessment of taxes against such foundations.

titlement to that exemption, they are certainly accurate. This, however, is only a statement of irreparable injury, which is the essential prerequisite for injunctive relief under traditional equitable standards and only one part of the *Williams Packing* test. As noted in *Bob Jones, ante*, at 745-746, allowing injunctive relief on the basis of this showing alone would render § 7421 (a) quite meaningless.

If, on the other hand, the court's comments about the inadequacy of a refund action for FUTA taxes are interpreted to mean that respondent lacks an opportunity to have its claims finally adjudicated by a court of law, we think they are inaccurate. Respondent's liability for FUTA taxes hinges on precisely the same legal issue as does its eligibility for tax-deductible contributions under § 170, namely its entitlement to § 501 (c)(3) status. And respondent will have a full opportunity to litigate the legality of the Service's withdrawal of respondent's § 501 (c)(3) ruling letter in a refund suit following the payment of FUTA taxes. *E. g., Christian Echoes National Ministry, Inc. v. United States*, 470 F. 2d 849 (CA10 1972), cert. denied, 414 U. S. 864 (1973).<sup>13</sup>

<sup>13</sup> That respondent has voluntarily paid FUTA taxes rather than challenging their imposition via a refund suit does not alter this conclusion. A taxpayer cannot render an available review procedure an inadequate remedy at law by voluntarily forgoing it. See *Graham v. Du Pont*, 262 U. S. 234 (1923).

It should also be noted that this case cannot be distinguished from *Bob Jones, ante*, p. 725, on the ground that petitioner in that case in theory will be subject to federal income taxes upon termination of its § 501 (c)(3) status, whereas respondent in this case will not, given that it has established § 501 (c)(4) status. Refund suits for federal income taxes and for FUTA (or FICA) taxes are fungible in the present context. So long as the imposition of a federal tax, without regard to its nature, follows from the Service's withdrawal of § 501 (c)(3) status, a refund suit following



We therefore conclude that there are no valid reasons to distinguish this case from *Williams Packing* for purposes of § 7421 (a) or to exempt respondent's suit from the dual requirements enunciated in that case.<sup>14</sup> The judgment is reversed.

*It is so ordered.*

MR. JUSTICE DOUGLAS took no part in the decision of this case.

MR. JUSTICE BLACKMUN, dissenting.

Finding myself in solitary dissent in this "tax" case, I am somewhat diffident about expressing views contrary to those the Court apparently has reached so easily. I do so only because I am disturbingly aware of the overwhelming power of the Internal Revenue Service. This power is such that its mere exercise often freezes tax status so as to endanger the existence of philanthropic organizations and the public benefits they secure, merely because the path to judicial review is so discouragingly long and expensive. I write primarily, therefore, to express what I feel is a needed word of caution about governmental power where the means to challenge that power are unfavorable and unsatisfactory at best.

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the collection of that tax is an appropriate vehicle for litigating the legality of the Service's actions under § 501 (c) (3). As noted in *Bob Jones, ante*, at 748 n. 22, we need not decide now the range of remedies available in such a refund suit, which, unlike this suit, is brought pursuant to congressionally authorized procedures.

<sup>14</sup> We think our reading of § 7421 (a) is compelled by the language and apparent congressional purpose of this statute. The consequences of the present regime for § 501 (c) (3) organizations can be harsh indeed, as MR. JUSTICE BLACKMUN ably articulates in his dissenting opinion today. As we noted in *Bob Jones, ante*, at 749-750, this may well be a subject meriting congressional consideration.

## I

"Americans United" Inc. (AU) is a District of Columbia nonprofit educational corporation organized in 1948. For almost 18 years AU was formally recognized by the Service as exempt from federal income tax under § 501 (c)(3) of the Internal Revenue Code of 1954, 26 U. S. C. § 501 (c)(3),<sup>1</sup> and its predecessor, § 101 (6) of the Internal Revenue Code of 1939.

On April 25, 1968, however, the Commissioner of Internal Revenue revoked AU's letter-ruling exemption on the ground that the organization no longer met the requirements of § 501 (c)(3) and, instead, was an "action" organization, within the definition of Treasury Regulations §§ 1.501 (c)(3)-1 (c)(3)(i) and (iv), in that a substantial part of its activities was devoted to the pursuit of objectives to influence legislation App. 7-10. The loss of its § 501 (c)(3) status, however, did not result

<sup>1</sup> AU's exemption ruling, under § 101 (6) of the 1939 Code, was issued July 3, 1950. Section 501 reads in pertinent part as follows:

"§ 501. Exemption from tax on corporations, certain trusts, etc.

"(a) Exemption from taxation.

"An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

"(c) List of exempt organizations.

"The following organizations are referred to in subsection (a):

"(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

in AU's becoming subject to federal income tax. This was because AU qualified as a civic league or other organization to which § 501 (c)(4) has application.<sup>2</sup>

The result, nevertheless, was distinctly adverse to AU in two respects. A contribution to the organization no longer was deductible by the donor under §§ 170 (a)(1) and (c)(2)(D) of the 1954 Code, 26 U. S. C. §§ 170 (a)(1) and (c)(2)(D), the latter of which closely parallels but is not identical with § 501 (c)(3). As a matter of much less concern, AU also became subject to federal unemployment tax under § 3301 of the Code, 26 U. S. C. § 3301, for exemption therefrom for § 501 organizations is limited to those that qualify under § 501 (c)(3). § 3306 (c)(8) of the 1954 Code, 26 U. S. C. § 3306 (c)(8).<sup>3</sup> AU has paid federal unemployment taxes,<sup>4</sup> and has stipulated that it will continue to do so.

<sup>2</sup> Section 501 (c)(4) relates to:

"(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

<sup>3</sup> Although, under § 312 (b)(8)(B) of the 1954 Code, 26 U. S. C. § 312 (b)(8)(B), AU was not required to pay tax imposed by the Federal Insurance Contributions Act so long as it was exempt under § 501 (c)(3), it had elected to do so, as was its privilege under § 3121 (k)(1)(A), 26 U. S. C. § 3121 (k)(1)(A). Termination of this accepted responsibility for tax requires two years' advance written notice and cannot be effected at all after an organization has been subjected to the tax eight years or more. § 3121 (k)(1)(D), 26 U. S. C. § 3121 (k)(1)(D). AU has been so taxed for more than eight years. Thus, it is unable to terminate its responsibility for tax under the FICA even if it were to continue as a § 501 (c)(3) organization.

<sup>4</sup> AU paid \$981.13 in federal unemployment tax for 1969; \$1,052.60 for 1970; \$889.09 for 1971; and \$1,131.36 for 1972. Brief for Petitioner 4 n. 2.

As a result of the revocation of its § 501 (c) (3) status, contributions by donors to AU declined sharply so that for the first time the organization was not able to raise enough funds to cover its expenses. AU and two of its benefactors then sought relief by the present suit.<sup>5</sup> They have alleged that the substantiality test of §§ 501 (c) (3) and 170 (c) (2) (D) created an unconstitutional disparity between large and small organizations; that the Commissioner revoked AU's exemption ruling punitively; that

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<sup>5</sup> The amended complaint requested both declaratory and injunctive relief. The latter, however, would be fully adequate and a declaratory judgment, as such, would not be needed. Accordingly, I am concerned only with the applicability of the anti-injunction statute, § 7421 (a) of the Code, 26 U. S. C. § 7421 (a).

The Commissioner has asserted that the Declaratory Judgment Act, 28 U. S. C. §§ 2201-2202, also provides a jurisdictional barrier to the suit because its general applicability is limited by the phrase, "except with respect to Federal taxes." While not reaching the question, I would agree with the Court's observation in the companion case, *Bob Jones University v. Simon*, ante, at 732-733, n. 7, that questions exist as to the scope of § 2201 and as to whether it is coterminous with § 7421 (a).

The Commissioner also asserts that the doctrine of sovereign immunity bars the present action. I do not agree. The suit, as the Court of Appeals noted, 155 U. S. App. D. C. 284, 295, 477 F. 2d 1169, 1180, falls within the immunity doctrine's exceptions enunciated in *Dugan v. Rank*, 372 U. S. 609, 621-622 (1963): "(1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void." Here, the claim is made that § 501 (c) (3) is unconstitutional and that the Commissioner administers the section in an unconstitutional manner.

In *Green v. Connally*, 30 F. Supp. 1150 (DC 1971), the court granted relief against Treasury officials comparable to that sought here. Inasmuch as the defense of sovereign immunity is jurisdictional, *United States v. Sherwood*, 312 U. S. 584, 586 (1941), this Court's summary affirmance of the *Green* case, *sub nom. Coit v. Green*, 404 U. S. 997 (1971), affords pertinent precedent.

it was unconstitutional to penalize First Amendment activity in this manner; and that § 501 (c)(3)'s "substantial" and "propaganda" standards were unconstitutionally vague. AU sought reinstatement on the IRS Cumulative List of Organizations so that contributions to it would be deductible by donors under §§ 170 (a)(1) and (c)(2)(D).

## II

The anti-injunction statute, § 7421 (a) of the Code, 26 U. S. C. § 7421 (a), reads in part:

"[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

In considering § 7421 (a), a two-step analysis is necessary: (1) When does the statute apply? (2) When it is applicable, under what circumstances is an exception permitted? It seems to me that the Court overlooks the first question in order to apply mechanically the criteria for an exception to the application of § 7421 (a).

The threshold question, obviously, is whether the present litigation is a "suit for the purpose of restraining" any tax. It is conceded that AU has no income tax liability and will have none regardless of the outcome of this litigation. AU has paid, and will continue to pay, federal unemployment taxes. Its assumption of FICA tax liability is frozen and cannot now be terminated.

It is in the context of this fixed and certain status as to all these federal taxes—income, unemployment, FICA—that "the purpose" of the present litigation, within the meaning of § 7421 (a), must be ascertained. AU asserts that the purpose is to determine its charitable status so far as benefactors are concerned. Indeed, one

surely must concede that, within the literal import of the statute's words, the suit is not one "for the purpose of restraining . . . any tax." It is, instead, a suit to assure the continuance of contributions utilized to sustain AU's operations.

I would not attribute to Congress, however, so simplistic a prohibition in § 7421 (a) as to enable an organization to circumvent the statutory barrier by a subjective protestation of the purpose for which an injunction is sought. In order to ascertain legislative intent, it is necessary to consider effect as well as purpose and thus to bring objective criteria into the analysis. See Recent Development, 73 Col. L. Rev. 1502, 1508-1510 (1973).

In *Bob Jones University v. Connally*, 472 F. 2d 903, 906 (1973), the Fourth Circuit concluded that when the withdrawal of an exemption "would ultimately result in potentially greater tax revenues," the obvious purpose of a suit to enjoin the withdrawal is to prevent the assessment of tax, and § 7421 (a) would be applicable. Thus, "purpose" was equated with ultimate tax effect. *Crenshaw County Private School Foundation v. Connally*, 474 F. 2d 1185, 1188 (CA5 1973), pet. for cert. pending No. 73-170, has a similar focus. In the present case the Court of Appeals took a different approach:

"The restraint upon assessment and collection is at best a collateral effect of the action, the primary design not being to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation." 155 U. S. App. D. C. 284, 293-294, 477 F. 2d 1169, 1178-1179.

In this view, applicability of the statute depends on the direct effect the relief sought would have on the plaintiff and not on the system as a whole.

As has been noted, the result of the injunction sought here would not directly inhibit the collection of tax from AU. It is also highly speculative what collateral effect, if any at all, the suit could possibly have on the federal revenue. If the assertion that AU's contributions have dried up is to be accepted, as I suspect it must be, I would presume that its erstwhile contributors have found other objects for their bounty, that is, other organizations whose names remain on the Service's vitally important Cumulative List. When nothing more than possible collateral effect on the revenues is involved, the Court's wide-ranging test of applicability of § 7421 (a), announced today, is, for me, too attenuated and too removed to be encompassed within the intendment of the statute's phrase, "for the purpose of restraining the assessment or collection of any tax."

In *Enochs v. Williams Packing & Navigation Co.*, 370 U. S. 1 (1962), this Court observed that the object of § 7421 (a) "is to withdraw jurisdiction from the . . . courts to entertain suits seeking injunctions prohibiting the collection of federal taxes," and "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." *Id.*, at 5 and 7. There undoubtedly is appropriate concern about the underlying danger that a multitude of spurious suits, or even of suits with possible merit, would so interrupt the free flow of revenues as to jeopardize the Nation's fiscal stability. See, e. g., *State Railroad Tax Cases*, 92 U. S. 575, 613-614 (1876); *Cheatham v. United States*, 92 U. S. 85, 89 (1876). Certainly, precollection suits could threaten planning and budgeting. But I do not perceive how the injunction desired in this case interferes with the area of concern that is the subject of § 7421 (a). Any po-

tential increase in revenues because donors no longer may contribute to AU and thereby obtain a § 170 (a)(1) deduction is, at best, only minor and speculative and is neither significant nor controlling. I, therefore, would accept "direct effect on the plaintiff" as a component to be considered in the ascertainment of the true "purpose" of the suit, within the meaning and reach of § 7421 (a).

I do not wish to indicate disapproval of *Williams Packing*. There a taxpayer sought to enjoin the collection of taxes. As the basis for equitable jurisdiction, it asserted that it would be thrown into bankruptcy if it were required to pay the taxes it challenged. The Court carefully noted that there may well be situations where "the central purpose of the Act is inapplicable and . . . the attempted collection may be enjoined." 370 U. S., at 7. To be sure, the Court narrowly confined exceptions to § 7421 (a) to instances where the plaintiff would suffer irreparable injury and where it was "clear that under no circumstances could the Government ultimately prevail." *Ibid.* If, however, this test is met, then the "manifest purpose" of the statute—to permit the collection of taxes without judicial intervention—is "inapplicable." The Court thus made it clear that there was an element, in addition to the traditional equity considerations previously spelled out in *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498 (1932), that must be present in order to avoid the proscription of the anti-injunction statute.

*Williams Packing*, of course, on its facts, is clearly distinguishable from this case. There the purpose of the suit was directly to restrain the collection of social security and unemployment taxes allegedly past due from that taxpayer. Here the avowed purpose is not to restrain tax collection but to assure AU's restoration on the Cumulative List. In *Williams Packing* it was the incidence of taxation that was challenged and the ir-



reparable injury of prospective payment of the tax was claimed as the equitable basis for the injunction. Nothing remotely resembling that is present here. To read *Williams Packing* as broadly as the Court does today is to make § 7421 (a) more restrictive than the Court in *Williams Packing* or Congress intended. The result is that § 7421 (a) becomes an absolute bar to any and all injunctions, irrespective of tax liability, of purpose or effect of the suit, or of the character of the Service's action.

There is a further consideration. Arguably, where the challenged governmental action is not one intended to produce revenue but, rather, is one to accomplish a broad-based policy objective through the medium of federal taxation, the application of § 7421 (a) is inappropriate.<sup>6</sup>

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<sup>6</sup> Some courts have endorsed this approach. In *McGlotten v. Connally*, 338 F. Supp. 448 (DC 1972), a suit to enjoin, among other things, the continuation of tax exempt status of organizations that excluded nonwhites from membership, Chief Judge Bazelon, in writing for a three-judge District Court, stated:

"Plaintiff's action has nothing to do with the collection or assessment of taxes. He does not contest the amount of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States. . . . In the present case, the central purpose [of the statute] is clearly inapplicable." *Id.*, at 453-454 (footnotes omitted).

See also *Green v. Connally*, 330 F. Supp. 1150 (DC), *aff'd sub nom. Coit v. Green*, 404 U. S. 997 (1971), where the three-judge court did not mention § 7421 (a) specifically but permitted the suit and granted relief; *Bob Jones University v. Connally*, 472 F. 2d 903, 907-908 (CA4 1973) (dissenting opinion). See the opinion of the Court of Appeals in the present case. 155 U. S. App. D. C., at 293-294, 477 F. 2d, at 1178-1179.

The purpose of the IRS action of itself is not controlling. The Court has found that "taxes" in the nature of a penalty were not within the meaning of § 7421 (a), *Hill v. Wallace*, 259 U. S. 44 (1922); *Lipke v. Lederer*, 259 U. S. 557 (1922), and has rejected, as well, the contention that an injunction could issue against a

Obviously, § 501 (c)(3) is not designed to raise money.<sup>7</sup> Its purpose, rather, is to assure the existence of truly philanthropic organizations and the continuation of the important public benefits they bestow.<sup>8</sup>

regulatory tax as opposed to a revenue measure. *Sonzinsky v. United States*, 300 U. S. 506 (1937). The Court relies on *Bailey v. George*, 259 U. S. 16 (1922), for the principle that even the collection of an unconstitutional tax cannot be enjoined. All these situations, however, have a factor in common with *Williams Packing* that is absent from the present suit: AU does not seek to restrain the Government's act of collecting any tax that it owes.

<sup>7</sup> Commissioner Alexander spoke to this effect in remarks to the American Society of Association Executives in New Orleans August 29, 1973:

"The IRS recognizes that the exempt organization provisions of the law must be interpreted and administered in light of their special purpose and their place in the tax law. Their purpose is *not* to raise revenue. Rather, they are designed to act as a guardian. They insure that exempt organization assets will be put to the approved uses contemplated in the law. Their application calls for an extraordinary degree of care and judgment." BNA Daily Tax Report, Aug. 30, 1973, p. J-1.

<sup>8</sup> The value of philanthropic organizations must be balanced against the revenue-raising objectives of the tax laws. Some of the factors to be weighed in this balance are reflected in the 1965 Treasury Department Report on Private Foundations:

"Private philanthropic organizations can possess important characteristics which modern government necessarily lacks. They may be many-centered, free of administrative superstructure, subject to the readily exercised control of individuals with widely diversified views and interests. Such characteristics give these organizations great opportunity to initiate thought and action, to experiment with new and untried ventures, to dissent from prevailing attitudes, and to act quickly and flexibly. Precisely because they can be initiated and controlled by a single person or a small group, they may evoke great intensity of interest and dedication of energy. These values, in themselves, justify the tax exemptions and deductions which the law provides for philanthropic activity.

"Private foundations play a significant part in the work of philanthropy. While the foundation is a relatively modern development,

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Another very important factor deserving consideration in this context is the hazard of vesting in the Commissioner virtual plenipotentiary power over philanthropic organizations. Although there can be little question that the Commissioner, under § 7805 (a) of the Code, 26 U. S. C. § 7805 (a), is properly vested with broad powers to "prescribe all needful rules and regulations for the enforcement" of the tax laws, there is nothing in the Code that suggests that he must be fully insulated from challenge when effectuating social policy.

AU has charged unconstitutional treatment pursuant to an unconstitutional provision. These are claims peculiarly within the province of courts and not of the Executive's administrative officers. The Court's opinion makes clear that a claim of this kind is now precluded from judicial determination until such time as the Court concludes that the Government could not ultimately prevail on the merits. Unless and until that conclusion is reached, the philanthropic organization is at the mercy of the Commissioner for the period of time—usually a

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its predecessor, the trust, has ancient vintage. Like its antecedent, the foundation permits a donor to commit to special uses the funds which he gives to charity. . . . In these ways, foundations have enriched and strengthened the pluralism of our social order.

"Private foundations have also preserved fluidity and provided impetus for change within the structure of American philanthropy. Operating charitable organizations tend to establish and work within defined patterns. . . . The assets of private foundations, on the other hand, are frequently free of commitment to specific operating programs or projects; and that freedom permits foundations relative ease in the shift of their focus of interest and their financial support from one charitable area to another. New ventures can be assisted, new areas explored, new concepts developed, new causes advanced. Because of its unique flexibility, then, the private foundation can constitute a powerful instrument for evolution, growth, and improvement in the shape and direction of charity." Senate Committee on Finance, 89th Cong., 1st Sess., 12-13 (Committee Print 1965).

substantial one—it takes for a claim to be filed and to work its way through the adjudicative process in the guise of a refund suit with its myriad pitfalls. And even this route is possible only if the organization has a tax that has been paid.<sup>9</sup> See Part III, *infra*.

The Court in *Bob Jones University*, *ante*, at 729–730, acknowledges that “appearance on the Cumulative List is a prerequisite to successful fund raising for most charitable organizations.” The program of exemption by letter ruling, therefore, is tantamount to a licensing procedure. If the Commissioner’s authority were limited by a clear statutory definition of § 501 (c) (3)’s requirement of “no substantial part,” or by an objective definition of what is “charitable,” there would be less concern about possible administrative abuse.<sup>10</sup> But where the philanthropic organization is concerned, there appears to be little to circumscribe the almost unfettered power of the Commissioner.<sup>11</sup> This may be very well so long

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<sup>9</sup> The Commissioner states that the majority of organizations exempt under § 501 (c) (3) operate at a loss so that no income tax liability would result if their exemptions were revoked. *Bob Jones University v. Simon*, Brief for Petitioner 23 n. 22.

<sup>10</sup> As has been noted, one of AU’s claims is that “substantial” and “propaganda,” as these words are employed in § 501 (c) (3), are unconstitutionally vague. There are no clear objective criteria by which the Commissioner draws his conclusions with respect to these terms. Moreover, the § 501 (c) (3) revocation is arrived at by the Commissioner not solely by construing the language of § 501 (c) (3), but by his assertion that that section and §§ 170 (a) (1) and (c) (2) (D) are *in pari materia*. Thus, the idiosyncrasies of the word “charitable” in § 170 (a) (1) are engrafted upon, and entwined with, the “organized and operated exclusively for religious, charitable . . . or educational purposes” standard of § 501 (c) (3). This is nowhere compelled by statute, but is the product of the Commissioner’s discretionary application and interpretation.

<sup>11</sup> In *Bob Jones University*, *ante*, at 740, the Court suggests that so long as an action of the Service reflects “a good-faith effort to

as one subscribes to the particular brand of social policy the Commissioner happens to be advocating at the time (a social policy the merits of which I make no attempt to evaluate), but application of our tax laws should not operate in so fickle a fashion. Surely, social policy in the first instance is a matter for legislative concern. To the extent these determinations are reposed in the authority of the Internal Revenue Service, they should have the system of checks and balances provided by judicial review *before* an organization that for years has been favored with an exemption ruling is imperiled by an allegedly unconstitutional change of direction on the part of the Service.

When an organization which has appeared on the Cumulative List seeks to enjoin what it claims is its illegal removal from that List and has no direct income tax liability or a *de minimis* collateral liability, the injunction, in my view, should not be within the prohibition of § 7421 (a).

### III

Concluding, as I have, that § 7421 (a) is not a bar to an injunction by AU, the traditional equitable considera-

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enforce the technical requirements of the tax laws," the presence of a collateral motive does not render the anti-injunction statute inapplicable. I do not perceive just where the good-faith inquiry is made. It certainly is not made at the determination whether a suit is for the purpose of restraining taxes. It is doubtful that it is made in determining whether there are any circumstances under which the Government may ultimately prevail on the merits. Moreover, for me, there is a distinct question as to the meaning of the Court's phrase, "a good-faith effort to enforce the technical requirements of the tax laws." Is innovation in effectuating social policy a good-faith effort to enforce technical requirements? Is a threat to revoke a university's exemption ruling made in good faith when it rests on the proposition that the institution does not comply with government-approved admission standards?

tions of irreparable injury and adequate alternative remedy must determine whether injunctive relief is appropriate. This is an inquiry independent of the question whether the anti-injunction statute applies, and is no different from the inquiry as to when injunctive relief is appropriate outside the tax field. See, for example, *Public Service Comm'n v. Wycoff Co.*, 344 U. S. 237, 240-241 (1952); *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500, 506-507 (1959). AU makes a vigorous and pressing claim that it is and will be irreparably injured by the loss of contributions since donors no longer receive an income tax deduction, and that this loss is completely unrecoverable even were AU ultimately to prevail on the merits. The Court in its opinion, *ante*, at 761-762, seems to accept the fact of irreparable injury here, just as the Court of Appeals recognized its presence as virtually inevitable. 155 U. S. App. D. C., at 292, 477 F. 2d, at 1177. Even where it has been found that § 7421 (a) bars a suit, it has been recognized that revocation of exempt status is an irreparable injury that otherwise satisfies the condition for the granting of injunctive relief. See, for example, *Bob Jones University v. Connally*, 472 F. 2d, at 906.

In addition to irreparable injury, the plaintiff must show that he has no adequate remedy at law. *Wilson v. Shaw*, 204 U. S. 24, 31 (1907). The Commissioner suggests that a plaintiff organization usually has three alternative remedies, any one of which is adequate: an income tax refund suit, a federal unemployment tax or FICA tax refund suit, and an accommodation suit by a selected donor in the form of testing his claim to a charitable deduction under §§ 170 (a)(1) and (c)(2)(D).

In AU's case the Commissioner, of course, cannot and does not contend that the income tax refund suit alternative is available. AU received § 501 (c)(4) status upon

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revocation of its § 501 (c)(3) exemption, and it is not subject to federal income tax so long as it retains § 501 (c)(4) status. Whenever that alternative is available, as in *Bob Jones University*, ante, p. 725, such availability not only indicates the existence of a remedy at law but that the direct effect of an injunction would be to restrain the collection of taxes.

An FICA tax refund suit is not available as an alternative to AU, since AU has made its election under § 3121 (k)(1)(A) and that election is now irrevocable. See n. 3, *supra*. Although AU conceivably might bring a refund suit for federal unemployment taxes,<sup>12</sup> the real question, and a substantial one, is whether that remedy is adequate for AU and is an effective route for the determination of the issues involved.

A suit for refund of federal unemployment tax, authorized under § 7422 of the Code, 26 U. S. C. § 7422, and with a period of limitations imposed by § 6532 (a), is directly geared to a determination of the technical

<sup>12</sup> The Court assumes the ready availability of an FUTA refund suit. *Ante*, at 762-763, n. 13. It is curious, however, that the Commissioner did not assert this possibility in the earlier stages of the litigation. It was suggested, apparently, only after the main briefing in the Court of Appeals. Tr. of Oral Arg. 36-37. It is also noteworthy that in discussing the problem former Commissioner Thrower has stated:

"There is no practical possibility of quick judicial appeal at the present. If we deny tax exemption or the benefit to the organization of its donors having the assurance of deductibility of contributions, the organization must either create net taxable income or other tax liability for itself as a litigable issue, or find a donor who as a guinea pig is willing to make a contribution, have it disallowed, and litigate the disallowance." Thrower, *IRS Is Considering Far Reaching Changes in Ruling on Exempt Organizations*, 34 J. of Taxation 168 (1971).

Whether procedurally feasible or not, there is some indication that such suits are not common practice.



aspects of FUTA liability and not to the larger constitutional issues. At most, the refund suit is an artificial vehicle to adjudicate questions other than entitlement to refund; its focus is on liability and not on eligibility under §§ 170 (a)(1) and (c)(2)(D). It is most doubtful, also, that potential contributors would regard a favorable outcome in such a suit as possessing the reliability of a favorable letter ruling. Assuming that AU could litigate its constitutional claims in an FUTA refund suit, see *Christian Echoes National Ministry, Inc. v. United States*, 470 F. 2d 849 (CA10 1972), cert. denied, 414 U. S. 864 (1973),<sup>13</sup> there are other obstacles in its path.

The suit for refund may not be maintained until a claim for refund has been filed. § 7422. The federal unemployment tax is imposed on an annual basis; thus, no refund can be claimed until the expiration of the year for which the tax is paid. Section 6532 (a)(1), as usual, precludes the suit until the claim is denied or six months have passed from the date of filing. Once suit is instituted, the Government has at least 60 days to answer the complaint. Under optimum conditions and with cooperation, the minimum period of time required to achieve the objective through the refund suit is one to two years from the time of revocation.<sup>14</sup> This is the delay if the

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<sup>13</sup> In *Christian Echoes* a nonprofit religious corporation sued for refund of FICA taxes in an aggregate amount exceeding \$103,000 paid over seven taxable years. The purpose of the suit, of course, was to recover the taxes paid, but constitutional challenges to § 501 (c)(3) were the basic legal arguments. There is no suggestion in the court's opinion that *Christian Echoes'* primary concern was with the loss of contributions; this, however, must have been of relative importance.

<sup>14</sup> Commissioner Thrower, in the article cited above, stated that "the issue under the best of circumstances could hardly come before a court until at least a year after the tax year in which the issue



organization wins and no Government appeal is taken. If an appeal follows, the delay in ultimate resolution drags on. *E. g.*, *Christian Echoes, supra*, where the ruling was revoked in 1966 and final judicial review was concluded only in 1973. While this is perhaps to be expected, and must be endured, in an ordinary tax refund suit, a delay of this magnitude defeats the adequacy of remedy when a philanthropic organization's very existence is at stake.

There are still other hazards. When small sums are at issue, as with AU's FUTA liability, the Government inadvertently or intentionally may concede the refund. This is not unlikely, for sound administration may not warrant the time and expense necessary to contest a claim of small amount when vital issues and conceivably profound precedents are at stake. *Church of Scientology v. United States*, 485 F. 2d 313 (CA9 1973), illustrates the Government's effort to win dismissal of a case when a refund had been made. See also *Mitchell v. Riddell*, 402 F. 2d 842 (CA9 1968), appeal dismissed and cert. denied, 394 U. S. 456 (1969). There is little doubt that the Commissioner possesses the authority to make the refund and moot the suit if he chooses not to litigate the underlying issues. Although I agree with the Commissioner

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arises. Ordinarily, it would take much longer for the case of the organization's status to be tried." 34 J. of Taxation 168.

The Commissioner also made significant remarks with respect to the need for judicial determination of issues involved in this case that will be precluded by the Court's interpretation of § 7421.

"This is an extremely unfortunate situation for several reasons. First, it offends my sense of justice for undue delay to be imposed on one who needs a prompt decision. Second, in practical effect it gives a greater finality to IRS decisions than we would want or Congress intended. Third, it inhibits the growth of a body of case law interpretive of the exempt organization provisions that could guide the IRS in its further deliberations." *Ibid.*

that to do so in a situation like that in the instant case would amount to bad faith, Brief for Petitioner 35 n. 25, it would be almost impossible for an organization to prove bad faith where, as here, the sum at issue is minimal and inadvertence or sound administration could be a valid reason for the refund.

Additionally, there is a substantial question whether an organization's eventual victory in a refund suit would accomplish its goal. The Commissioner has asserted that "normal practice is to issue a favorable ruling upon the application of an organization which has prevailed in a court suit," Reply Brief for Petitioner 34-35, n. 31. Still, the IRS Exempt Organizations Handbook states:

"An organization which obtains a Tax Court or Federal court decision holding it to be exempt must file an exemption application and establish its right to exemption before the Service will recognize its exemption for years subsequent to those involved in the court decision." Department of Treasury, Internal Revenue Manual, Part XI, c. (11) 671, ¶ 270.

Whatever the internal practice may be, the published procedures cast serious doubt on the adequacy of the refund suit to resolve the organization's urgent problem. The revenue ruling has prospective application, whereas a court determination operates retrospectively to the extent the pleadings and proof and the applicable statute of limitations permit.<sup>15</sup> Thus, the scope of relief available in a refund suit is also uncertain. The orga-

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<sup>15</sup> See Note, Procedural Due Process Limitations on the Suspension of Advanced Assurance of Deductibility, 47 S. Cal. L. Rev. 427 (1974), for a detailed discussion of constitutional considerations of IRS letter-ruling revocation without a hearing.

nization is then faced with the dilemma of choosing between a so-called pre-assessment suit, which the Court says it cannot bring, and a refund suit that decides little more than the correctness of a particular year's tax liability (which in this case has been paid and is of little or no concern).

The staged suit by a "friendly" donor is the Commissioner's other suggestion. The donor's suit suffers the same time problems. The organization is off the Cumulative List at least until the donor establishes his entitlement to a §§ 170 (a)(1) and (c)(2)(D) deduction. This suit also may be mooted. Moreover, litigation by the accommodating donor does not permit the organization to assert its rights and interests. Could the donor make the First Amendment and equal protection claims that AU seeks to have determined? Not only must AU rely on a contributor to raise issues for it, but it must find a donor who is willing both to contribute and to undertake the task of litigation. This strains largesse to the extreme, particularly since the suit will subject the donor to routine full audit of his own return.

I conclude that neither course is an adequate remedy for an irreparably harmed organization to vindicate its claims.<sup>16</sup> Thus, equitable relief in the form of an injunction is not inappropriate.

<sup>16</sup> The contention that the remedies suggested by the Commissioner are inadequate is supported by most of the commentators who have addressed the issue since these cases were decided in the courts of appeals. See Note, Constitutional Implications of Withdrawal of Federal Tax Benefits From Private Segregated Schools, 33 Md. L. Rev. 51, 53 (1973); Note, The Loss of Privileged Tax Status and Suits to Restrain Assessments, 30 Wash. & Lee L. Rev. 573, 590 (1973); Comment, Avoiding the Anti-Injunction Statute in Suits to Enjoin Termination of Tax-Exempt Status, 14 Wm. & Mary L. Rev. 1014, 1025 (1973); Recent Development, 73 Col. L. Rev. 1502, 1513-1514 (1973); Notes, 46 Temp. L. Q. 596, 601 (1973).

## IV

The last issue is whether the amended complaint presented a substantial constitutional question on the merits justifying the convening of a three-judge court under 28 U. S. C. § 2282. The test was enunciated in *Ex parte Poresky*, 290 U. S. 30, 32 (1933), and restated in *Goosby v. Osser*, 409 U. S. 512, 518 (1973), and in *Hagans v. Lavine*, 415 U. S. 528, 542-543 (1974). The Court of Appeals in the present case said that "the possibility of success is not so certain as to merit the *Enochs* exception with respect to § 7421 (a), yet not so frivolous or foreclosed as to merit denial of the § 2282 motion." 155 U. S. App. D. C., at 298, 477 F. 2d, at 1183. I do not differ with that determination.

I, of course, imply no opinion on the merits of the underlying controversy.

Since I cannot join the Court's reversal of the Court of Appeals' judgment, I respectfully dissent.

